**Excel Case Ready *and* United Food and Commercial Workers Union, Local 791, AFL–CIO, CLC.**
Cases 1–CA–37682 and 1–CA–37769

May 18, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

On July 28, 2000, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed an answering brief. The Respondent filed a reply brief.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[3] and has decided to affirm the judge's rulings, findings,[4] and conclusions and to adopt the recommended Order as modified.[5]

As set forth in greater detail in his decision, the judge found, and we agree, that the Respondent committed serious and pervasive unfair labor practices in a successful effort to "nip in the bud" the Union's organizational campaign. Specifically, the judge found that employees were coercively interrogated about their union activities, threatened with loss of their 401(k) plan, and threatened with reprisals if they selected the Union, including a threat "to make your lives a living hell." In addition, the Respondent engaged in surveillance of union activities by searching employees' lockers and confiscating union materials.

The Respondent's unfair labor practices were not limited to violations of Section 8(a)(1). Threats were not only made, but also were executed. After telling employees that it was "going to take care of the troublemakers," i.e., "weed[] out people" for "wanting to be in the Union," and then "they won't have a problem no more," the Respondent discharged employee union organizers Keith Fiola, Tamila Fiola, and Michael Paiva in violation of Section 8(a)(3) and (1). The judge found that the Respondent discharged these employees after it learned that the Union had obtained authorization cards from 21 of its 32 employees, and that it did so "to undercut the Union's majority." In terminating the Fiolas and Paiva, the Respondent "frustrated the hopes of the majority to obtain union representation[.]"

The Respondent's discriminatory conduct also encompassed employees who did not support the Union. In this regard, the judge found that the Respondent unlawfully terminated employees Jan Pacheco and Ernest Watson, although they were not prounion, because the Respondent believed that such action was necessary to conceal its unlawful motive in discharging employee organizer Paiva.

In light of the nature and extent of the Respondent's violations, the judge concluded that the additional notice and access remedies ordered by the Board in *Audubon Regional Medical Center*, supra, 331 NLRB at 375, 376, were "necessary to dissipate fully the coercive effects of the discharges and other unfair labor practices."[6] We agree with the judge.

[1] No exceptions were filed to the judge's recommended dismissal of the allegation that the Respondent violated Sec. 8(a)(1) of the Act by granting first-shift employees a wage increase.

[2] In its reply brief, the Respondent moved to strike the General Counsel's brief, asserting a failure to conform to Sec. 102.46(b)(1) of the Board's Rules and Regulations. Although the General Counsel's brief does not conform in all respects to the Board's Rules, we find that it is not so deficient as to warrant striking. We will, however, disregard arguments made by the General Counsel in his brief addressing issues beyond the scope of the Respondent's exceptions.

[3] The Respondent has requested oral argument. The request is denied as the record, exceptions and briefs adequately present the issues and the positions of the parties.

[4] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends that some of the judge's credibility findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the contention is without merit.

In his remedy section, the judge found that the Respondent must offer employee Jan Pacheco reinstatement to the second-shift lead position because the Respondent had promised her that job before it discriminatorily discharged her. The Respondent has not excepted to this finding. The Respondent has excepted, however, to the judge's further finding that if Pacheco does not accept reinstatement to the second-shift lead position, the Respondent must offer that job to unlawfully discharged employee Keith Fiola. We find that the issue raised by the Respondent's exception is one more appropriately resolved at the compliance stage of this proceeding.

[5] In light of the nature and extent of the Respondent's violations, we shall substitute a broad cease-and-desist order for the narrow one recommended by the judge. As discussed below, the Respondent's misconduct demonstrates the Respondent's "general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979). See, e.g., *Audubon Regional Medical Center*, 331 NLRB 374, 375 (2000) (broad remedial order warranted in addition to special remedies).

[6] The judge recommended, inter alia, that the Respondent be ordered to supply the Union, upon its request, with the names and addresses of current bargaining unit employees and grant the Union reasonable access to its bulletin boards and all places where employee notices are customarily posted. The judge also recommended that the Respondent convene all bargaining unit employees during working time at the Respondent's facility, and that a responsible management official read the Board's notice to employees or that the Respondent permit a Board

The Board has broad discretion to fashion "a just remedy" to fit the circumstances of each case it confronts. *Maramont Corp*., 317 NLRB 1035, 1037 (1995). The Supreme Court "has repeatedly interpreted [Section 10(c)] as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898–899 (1984). A Board-ordered remedy should stand "unless it can be shown that [it] is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (quoting *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). Furthermore, "the task of evaluating the likely rate of dissipation of the coercive impact of [the respondent's] conduct, like the task of evaluating its original potency, is one that Congress has entrusted to the Board and its expertise." *Kenrich Petrochemical, Inc. v. NLRB*, 907 F.2d 400, 408 (3d Cir. 1990), cert. denied 498 U.S. 981 (1990).

Here, the judge correctly recognized that the usual Board remedies are not sufficient to undo the effects of the Respondent's illegal activities. On this record, there can be no doubt that, upon learning of its employees' union activities, the Respondent systematically embarked on a campaign to rid its work force of leading union adherents. The Board considers the unlawful discharges of union supporters to be highly coercive or "hallmark violations" of the Act. *Garney Morris, Inc.,* 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995) (stating that such employer conduct is "likely to have a long-term coercive impact [because it is] among the most flagrant forms of interference with employees' Section 7 rights"). This is particularly true where, as here, the leaders of the union movement were targeted for termination. In addition, the record establishes that the decision to discharge the Fiolas was made by Corporate Vice President Dave Wesling. Thus, the Respondent's involvement in these discriminatory discharges implicates the company's upper hierarchy. Such involvement "exacerbates the natural fear of employees that they [will] lose employment if they persist[] in their union activities[,]" and "are likely to have a lasting impact not easily eradicated by the mere passage of time or the Board's usual remedies." Id. Furthermore, where as here, a small bargaining unit is involved, the "probable impact of [the] unfair labor practice is increased." *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, ~~1082 (7th Cir. 1981). In sum, as stated by the First~~ agent, in the presence of a responsible management official, to read the notice to employees.

sum, as stated by the First Circuit, the Respondent's misconduct in this case had a "'substantial, chilling effect on Union activity,' [and] unionization efforts 'had ground to a halt[.]'" *NLRB v. Excel Case Ready*, 238 F.3d 69, 73 (2001) (quoting *Pye v. Excel Case Ready*, Memorandum and Order, No. 00–10603–MLW, slip op. at 11 (D.Mass. 2000) (enfg. District Court order granting injunction under Sec. 10(j) of the Act)).

The additional remedies selected by the judge are well "adapted to the situation which calls for redress." *NLRB v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, 348 (1938).

Ordering the Respondent to provide the Union the names and addresses of its current bargaining unit employees "will enable the Union to contact all employees outside the [workplace] and to present its message in an atmosphere relatively free of restraint and coercion."[7] Ordering the Respondent to grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where notices to employees are customarily posted will provide the Respondent's employees "with reassurance that they can learn about the benefits of union representation, and can enlist the aid of union representatives, if they desire to do so, without fear of" retaliation by the Respondent.[8] Ordering the Respondent to convene bargaining unit employees during work time and have a responsible management official—or a Board agent—read the notice to employees will ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the Respondent's bulletin boards. As the Fifth Circuit has observed, the "reading requirement is an effective but moderate way to let in a warming wind of information and, more important, reassurance." *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969).

In sum, the special notice and access remedies recommended by the judge are appropriate here in order to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices.[9] Our Order will afford the Union "an opportunity to participate in the restoration and reassurance of employee rights by engaging in future organizational efforts, if it so chooses, in an atmosphere free of further restraint and coercion."

[7] *Blockbuster Pavilion*, 331 NLRB 1274 (2000).

[8] *United States Service Industries*, 319 NLRB 231, 232 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997).

[9] Chairman Truesdale agrees that in light of the nature and extent of the Respondent's violations, a broad order and special remedy requiring the Respondent to supply the Union with unit employee names and addresses are warranted here. However, contrary to the majority, he would not impose the additional special remedies requiring reading of the notice and reasonable access to bulletin boards.

*United Dairy Farmers Cooperative Assn.,* 242 NLRB 1026, 1029 (1979), enfd. in relevant part 633 F.2d 1054 (3d Cir. 1980).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Excel Case Ready, Taunton, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(f).

"(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, warn, or otherwise discriminate against any of you for supporting United Food and Commercial Workers Union, Local 791, AFL–CIO, CLC, or any other labor organization.

WE WILL NOT discharge any of you to conceal an unlawful motivation for discharging a union supporter, or to undercut the Union's majority support among you.

WE WILL NOT engage in surveillance of your union activities.

WE WILL NOT threaten you with the loss of your 401(k) savings plan or with other reprisals if you select a union to represent you.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Keith Fiola, Tamila Fiola, Jan Pacheco, Michael Paiva, and Ernest Watson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Keith Fiola, Tamila Fiola, Jan Pacheco, Michael Paiva, and Ernest Watson whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Keith Fiola, Tamila Fiola, Jan Pacheco, Michael Paiva, and Ernest Watson, and the written warning to Keith Fiola, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL supply the Union, on its request made within 1 year of the date of the Board's Decision and Order, with the full names and addresses of all current bargaining unit employees.

WE WILL, on request, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to our employees are customarily posted.

WE WILL convene during working time all unit employees at our Taunton, Massachusetts facility, by shifts, and have a responsible management official read this notice to the employees, or at our option, permit a Board agent, in the presence of a responsible management official, to read this notice to employees.

EXCEL CASE READY

*William F. Grant* and *Linda Harris Crovella, Esqs.,* for the General Counsel.

*Robert D. Overman, Esq. (Morris, Laing, Evans, Brock & Kennedy*), of Wichita, Kansas, for the Respondent.

*William H. Pyle, Esq. (Pyle, Rome & Kichten*), of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

-, Administrative Law Judge. This case was tried in Boston, Massachusetts, on January 12–16, 2000. The charges were filed by the Union on November 3 (amended December 7) and December 16, 1999.1 The complaints were issued and consolidated December 16 and January 5, 2000, and amended at the trial.

The Respondent Excel Case Ready (the Company) is a subsidiary of Excel Corporation (Corporate). The Company, which went into production at its new facility in Taunton, Massa-

[1] All dates are in 1999 unless otherwise indicated.

chusetts, on August 13, issued its employees an "Employee Handbook" that Corporate prepared and furnished. On the front page the handbook provides, in part:

*A WORD ABOUT UNIONS*

> Excel Case Ready–Taunton *has committed to its employees to maintain a union-free environment*. . . . we believe that third party representation is neither necessary nor beneficial to any of us. . . . we will treat all employees honestly and fairly and with the trust and respect that an Excel employee is entitled regardless of their opinion of unionization. [Emphasis added.]

Employee Keith Fiola began leading the Union's organizing drive after signing a union authorization card at the first union meeting on October 7. By the time of the well-attended third union meeting on Thursday, October 21, the total number of signed cards was 21, 65-percent majority of the 32 employees at the time.

The following Monday night, October 25–26, Keith Fiola and his wife, employee Tamila Fiola, were delayed getting home from a professional wrestling match. Arriving home after 1 a.m., Keith Fiola left a message on the Company's answering machine stating, in relevant part, "We just got back in. . . . I'm not going to come in with only 3 hours of sleep, so I'm just letting you know that I'm calling in sick . . . myself and my, my wife." If he had not called in for the unpaid sick leave, the maximum disciplinary action for an excused absence would have been a verbal warning.

As personally decided by David Wessling, the vice president of human resources for the entire Excel Corporation (which has about 20,000 to 25,000 employees in the United States, Canada, and Australia), the Company discharged both Keith and Tamila Fiola on their next workday, October 27, for "calling in sick if they weren't really sick," purportedly a "falsification." Production Supervisor Reginald Picanco had recommended that they be "written up," a verbal warning for their first unexcused absence under the employee handbook.

Following these discharges—as Corporate also decided—the Company discharged union organizer Michael Paiva and two other employees, Jan Pacheco and Ernest Watson, for "falsification."

The primary issues are whether the Company

> (1) engaged in surveillance of union activity,
>
> (2) threatened employees with loss of benefits and other reprisals,
>
> (3) coercively interrogated employees about their union activities,
>
> (4) granted a wage increase to discourage union support,
>
> (5) issued a warning to the leading union organizer Keith Fiola to build a case for discharging him,
>
> (6) discharged Keith Fiola, his wife Tamila Fiola and union organizer Michael Paiva to undercut the union majority, and
>
> (7) discharged antiunion employees Jan Pacheco and later Ernest Watson to conceal its unlawful motivation for terminating Michael Paiva, violating Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Company, a corporation, processes and packages ground beef at its facility in Taunton, Massachusetts, where it annually receives goods valued over $50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. Background*

Excel Case Ready (the Company) is a subsidiary of Excel Corporation (Corporate), which has about 20,000 to 25,000 employees in the United States, Canada, and Australia. Corporate is a subsidiary of Cargill, Inc. (Cargill), a multinational firm with about 80,000 employees. (Tr. 523–524, 1090.)

The Company's Taunton, Massachusetts nonunion facility went into production on August 13 to supply packaged ground beef (from Corporate's kill facilities in the Midwest) to Shaw's union supermarkets in Connecticut, Massachusetts, and Rhode Island (Tr. 34–35, 797, 802). Endeavoring to preserve the nonunion status of the Taunton plant, the Company issued its employees an "Employee Handbook," which Corporate prepared and furnished and in which Cargill's policies and "Guiding Principles" are referred to (Tr. 183, 907; R. Exh. 1 pp. 16, 18, 21). On the front page the handbook provides, in part (Tr. 97; GC Exh. 2 p. 1):

*A WORD ABOUT UNIONS*

> Excel Case Ready–Taunton *has committed to its employees to maintain a union-free environment*. . . . we believe that third party representation is neither necessary nor beneficial to any of us. . . . we will treat all employees honestly and fairly and with the trust and respect that an Excel employee is entitled regardless of their opinion of unionization. [Emphasis added.]

In employee orientation, Plant Manager Stephen Fleming assured the employees, "I wanted to run [the Company] in Taunton as a family and have a close knit group where everybody felt that they could share their opinions," that he "could take good enough care of the employees," and "you don't need" a union "because we can handle things" without a union (Tr. 410–411, 817–818).

The Union began an organizing campaign in early September. From the beginning, the Union was a "very hot" topic of discussion. The employees were divided in separate groups of those supporting and those opposing the Union. (Tr. 17–18, 38–40, 163, 167–168, 905.)

The organizing made little headway for about the first month. By the end of September, however, the long working hours—as high as 12-hour shifts, 6 or 7 days a week—caused low employee morale. Apparently because of the long hours, nonunion wages, and postponement of the Company's benefit program until "the 1st of the month following 6 months after date of hire," the Company experienced a high employee turnover. Many employees were leaving, and long hours were necessary to get out production with the remaining employees. (Tr. 19, 21, 128–131, 244, 434–437, 567, 802, 820; GC Exh. 2 pp. 4, 6.)

#### *B. Discharge of Leading Union Organizer Keith Fiola and Tamila Fiola*

##### 1. Their union activity

Keith Fiola (hired August 2 as the Bizerba machines operator, with No. 1 seniority) initially was merely inquisitive about the Union, but his wife (hired September 2) was opposed to the Union. Their attitudes changed when Keith Fiola was working very long hours. In the entire 3 weeks ending Sunday, October 10, he worked 12 hours a day, 7 days a week. (Tr. 11, 121–122, 151–152, 160.)

They were the only two employees who spoke up October 6 when Fleming talked to the employees in a meeting about the long hours. Fleming reminded the employees that he was "trying to run [the Company] like a family" and was "working hard to get things straightened out." It was then that Tamila Fiola told Fleming, "I'm about this far from joining the Union." (Tr. 153–154, 834.)

After the October 6 meeting, employee Reginald Murphy (a member of the prounion group) came up to Keith and Tamila Fiola and said, "If you really want to talk to the Union, I'll be glad to get you a meeting together." They said, "That's fine," and Keith Fiola "told pretty much everybody" about the meeting. (Tr. 153.)

The next morning, October 7, Production Supervisor Reginald Picanco stopped speaking to Keith and Tamila Fiola, even about production. Both of them needed production sheets in performing their work. Keith Fiola was operating the Bizerba machines, which weigh and place top and bottom labels on each package of ground beef that is processed on the two production lines. Tamila Fiola was operating one of the Mondini machines, which gas-flush the meat (for longer shelf life) and heat-seal the different-sized packages. To avoid speaking to either of them, Picanco began handing the sheets to another employee to give them. (Tr. 28, 116, 121–123, 125–126, 128–129, 135, 164–165, 800–801.)

Picanco claimed that he stopped giving Keith Fiola the production orders "Maybe a day here and there" and maybe only "a day or two" and that "if I'm busy, I don't have time to talk to you" and that "doesn't mean I'm ignoring you" (Tr. 589). By his demeanor on the stand, Picanco appeared willing to fabricate whatever might seem plausible to support the Company's defenses.

In another meeting on October 7, Fleming again discussed their long working hours and announced a new schedule that he wanted to take effect November 1, giving employees a definite time off each week. He also stated that if employees wanted to leave work at their regular 2:30 p.m. quitting time, to go ahead after informing their supervisor. (Tr. 154–155, 820.)

By the time of the meeting, Fleming had heard "throughout the entire plant" about a scheduled union meeting. He told the employees there was a union meeting at Pub 99 at 7 o'clock that evening. He said, "I want everybody in here to go" and "Ask them what they can get you now." Then, confirming his opposition to the Union, he added: "When you come back here, I'll bring in some former members of Local 791 and let them tell you how they got done by the Union." (Tr. 26, 155, 248, 821–823, 905–906, 909.)

There was an "open discussion" about talk of the Union getting them higher wages and health insurance. One employee said that health insurance for his kids and family was one of the biggest concerns, because the Company's benefits program was not in effect for the first 6 months. There had been talk on the floor that the wages should be $14 or $15 an hour for the work they were doing (instead of $8.50 to $10.50). (Tr. 434–437, 488–489, 822–823; GC Exh. 2 p. 6; R. Exh. 1 p. 6.)

After Fleming revealed his knowledge of the scheduled union meeting and repeated his opposition to the Union, antiunion employees circulated a rumor that Keith and Tamila Fiola were going to be fired. They were the only two employees who attended the October 7 union meeting. Both of them signed union authorization cards at the meeting, and Keith Fiola began leading the organizing campaign. He became known in the plant after that as the "union steward" or "shop steward." Tamila Fiola assisted in the organizing. (Tr. 27–34, 37, 118, 134–135, 157–160, 162–163, 171, 255–256, 266, 703, 946–948.)

By the time of the October 14 employee meeting, support of the Union was growing. Fleming told the employees he had "tried running the Company as a family" and "that did not work," so he was going to run it "as a Company" and would "go *by the book* [emphasis added]." (Tr. 41, 47–48, 135, 174.) Keith Fiola credibly testified that about mid-October (when rumors were circulating that he had "a lot of cards signed"), Quality Assurance Manager Bill Wilkinson (who had been very friendly) came downstairs and talked to him. It is undisputed that Wilkinson told him (Tr. 41).

> Well, I guess I'm going to have to start writing people up. . . . Steve [Fleming] tried to run this place like a family, but now he's running it by the book, and he wants people who are doing things wrong written up.

Fleming admits that he "made eye contact" with Tamila Fiola in the October 14 meeting and told the employees "if Tamila got fired tomorrow I wouldn't feel bad for her at work," but "outside of work I could feel horrible for her," pointing out that "business is business and personal is personal." When Tamila Fiola responded, "Well, hey Steve, is this your nice way of telling me I'm fired?" Fleming just chuckled. (Tr. 47–48, 55, 175, 835–837.) Before the previous October 7 meeting, Fleming and Tamila Fiola had been very friendly (Tr. 164–165). Fleming had also been "very cordial" to Keith Fiola and had "joked around" with him (Tr. 52, 61–63).

There was a large turnout at the Union's third meeting on Thursday evening, October 21, when a total of 21 employees signed authorization cards, *a 65-percent majority of the 32 employees at the time*. The next morning, Friday, October 22, the word had gotten back to the Company. Production Supervisor Picanco asked Keith Fiola, "I heard you got 21 cards signed?" (Tr. 37, 58, 60.) I discredit Picanco's denial (Tr. 595).

Meanwhile, earlier that week (on October 18 or 20), Picanco told a group of union supporters that "If the Union comes in, I'm going to make your lives a living hell." One of the employees said, "You can get in trouble for that," and Picanco responded, "I'd deny it to my dying day." (Tr. 45, 171, 207–208.) In the Company's defense, Picanco admitted "I recall being in that group," but claimed, "I don't recall making that comment" about making life hell for them. He then claimed that his comment was "I *could* [emphasis added] make their life a living hell." (Tr. 588.) I discredit Picanco's version of what he said.

2. Plans for discharging Keith and Tamila Fiola

*a. After first union meeting*

Inside knowledge of what the Company was planning was revealed by two employees who had first-hand information.

One was antiunion employee Jan Pacheco, whom the Company promised a lead position on the upcoming second shift. Pacheco was supplying information about union supporters directly to Plant Manager Fleming and Production Supervisor Picanco. (Tr. 369, 374–375, 485, 598–599, 637–639, 642, 644–647, 752–754.) She impressed me most favorably on the stand as a truthful witness, giving her best recollection of what she had observed and participated in.

Pacheco credibly testified that after work on October 8 (the day after Keith and Tamila Fiola attended the Union's first meeting at Pub 99), James Cozzone invited Picanco and Pacheco to go for a drink at the VFW Club across the street from the plant. (Picanco invited antiunion employees Joseph Pereira and Ryan Redican to join them.) Cozzone was a maintenance leadman at the plant for UNICCO, an outside contractor. (Tr. 31–33, 156, 158–159, 168, 192, 386, 500, 602–603, 653, 672–673, 718.)

Pacheco credibly testified, contrary to Picanco's denials, that at the VFW, Cozzone told Picanco, Pacheco, and the two other company employees that he had attended the October 7 union meeting "to find out information for management." Cozzone talked about Keith and Tamila Fiola being at the meeting and told Picanco, "You've got to get rid of" Keith and Tamila Fiola, that "they're trouble for the Company." Picanco responded that "He was going to take care of [Keith Fiola]. It was in the making" and "they were going to take care of the troublemakers." (Pacheco told both Fleming and Picanco that Keith Fiola was the "biggest troublemaker.") (Tr. 374, 384–387, 501, 602–603, 618.)

Neither Cozzone nor Redican testified. When Pereira was asked on cross-examination if Cozzone mentioned why he went to the union meeting the evening before, Pereira answered, "To find out what was going on, I guess." He claimed that Cozzone did not say who or how many people were there. He also claimed that he did not remember exactly what Picanco said. (Tr. 727–728.) By his demeanor on the stand, Pereira did not appear to be a candid witness.

The Company took no immediate action to discharge Keith Fiola and other "troublemakers." Pacheco credibly testified, however, that Fleming told her that the union supporters "were all going to go" if "they signed those [union] cards," and "That's why I was supposed to find out who was signing cards" (Tr. 411).

Previously, before Keith Fiola's union activities, Picanco had promised him (with no. 1 seniority) a lead position if he would go to the upcoming second shift. It was after he became the leading union organizer that the Company instead offered Pacheco the lead position. (Tr. 11, 53–54, 482–483.)

Both Fleming and Picanco told Pacheco not to let the production employees know about her preparations for being promoted to a lead position. As she credibly testified, employees were "complaining about why I was walking around" and were "trying to find out if I was management, turning them in [about their union support]." (Tr. 261–262, 371–375, 380–381, 485, 488.)

*b. After union majority*

As found, on Friday, October 22, the morning after the Union's well-attended third meeting, word got back to the Company that a total of 21 of the employees had signed authorization cards, a 65 percent majority of the 32 employees at that time. The Company's knowledge was confirmed by Production Supervisor Picanco's asking leading organizer Keith Fiola, "I hear you got 21 cards signed?"

By that time, Pacheco was well in the confidence of the Company. She was not only aware of the action the Company took that Friday afternoon, October 22, to start building a case for discharging Keith Fiola, she took part in the action herself, as found below.

Then, the next day, Saturday, October 23, Picanco revealed to Pacheco the Company's plans to discharge both Keith and Tamila Fiola.

On that Saturday, after Pacheco told Plant Manager Fleming she was planning to quit because of "torment from the employees," Picanco called her outside in the back of the building to talk to her. Picanco urged her not to leave because she was "his best worker" and told her to stay until December (when the Company was then planning to add the second shift), stating that "things were going to change. (Tr. 405–406, 490–491.)

As Pacheco credibly testified, contrary to Picanco's denials, he told her he was *going to get rid of Keith and Tamila Fiola* and another employee, stating "they're weeding out people" for "wanting to be in the Union" and "they won't have a problem no more" (Tr. 406–407, 491, 601, 650–65).

Regarding Production Supervisor Picanco's lack of credibility, I specifically discredit as fabrications Picanco's testimony that (a) from early October, he never mentioned the Union to any employee, (b) that besides hearing the word "union" come up, he had "no idea . . . whether the employees were trying to get a union in that plant after September," (c) "No," he did not know "if employees signed union cards after September," (d) "*No, I did not*" *know that* "*Mr. Fiola supported the Union*," and (e) "*No, I did not*" *have any idea that* "*Keith [Fiola] was for the Union*" (emphasis added) (Tr. 614–616, 624, 669, 672).

I note that Warehouse Supervisor Tammy Blackburn admitted at the trial that everybody she was aware of knew that Keith Fiola was being called the shop steward and that he was kind of running the union drive (Tr. 703, 705–706).

Although Fleming *denied* on cross-examination having "heard the standing joke in the plant about Keith Fiola being the shop steward" (Tr. 910), he later *admitted* that when Keith and Tamila Fiola had previously come to his office, Keith Fiola "said everybody still thinks that I'm the union steward" (Tr. 946). When asked on cross-examination if "it was pretty much common knowledge that [Keith Fiola] was the person behind the union movement," Fleming answered, "It was pretty much common knowledge that he was in favor or it. I don't know if he was the person behind it." (Tr. 910.) He later admitted, however, yes, there were "rumors through the facility" that "Keith Fiola was the person regarded as leading the campaign for the Union" and also rumors that his wife was in favor of the Union (Tr. 948).

By Fleming's demeanor on the stand, he appeared not only to be evasive, but also was less than candid in giving testimony to support the Company's defenses.

The other employee with inside knowledge of the Company's plans was Debra Nechesnoff, the human resources clerk who assisted Administration Manager Gail Thornton, performing many of the human resources responsibilities. As discussed below, she revealed Corporate's plans for discharging union supporters.

3. Keith Fiola's October 25 warning

*a. Fleming's office meeting with Keith Fiola*

On Monday morning, October 25 (3 days after Picanco asked Keith Fiola, "I heard you got 21 cards?" and 2 days after Picanco told Pacheco he was going to get rid of Keith and Tamila Fiola), Fleming took Keith Fiola to the office (Tr. 70).

As Keith Fiola credibly testify, Fleming told him there that "the packout *girls* [plural] had stated that on Friday," he "told them to throw away perfectly good meat"—instructing them to pop-open sealed, gas-filled packages of meat containing metal as they came through the metal detector and to throw away "this perfectly good meat." I said, "Who told you that?" Fleming refused to say and Keith Fiola asked, "How can I be getting accused of something when you won't even tell me who said it?" (Tr. 70–72, 845–849.)

Keith Fiola then asked, "What time did this occur?" Fleming went through something on his desk and said, "Well, this happened about 4:30 or 5 o'clock." Keith Fiola said, "Wait a minute. I punched out" at 2–2:30 and offered to show Fleming his timecard. (Tr. 70.)

Fleming said, "No, that isn't necessary. . . . I'm going to let you know that it is direct violation of company policy [for] *destruction of company [property]*, and *you can be terminated for it* [emphasis added]." . . . I really didn't think you would do something like that. . . . But I have to act upon it. . . . what I'm going to do is, I'm going to write this up and put it in your file that we had a verbal conversation." (Tr. 70–72.) Keith Fiola responded (Tr. 72, 74):

> Well, I'm not going to sign nothing, and I don't understand why you're writing me up, because first of all, you've told me that it happened when I wasn't here. Secondly, I totally deny any doing in it. Thirdly, no supervisors had seen me doing it.
>
> . . . .
>
> I said, "Why am I being verbally warned when I didn't do it?" . . . He told me he was going to write it up and put it in my file. I asked him for a copy of that and never once received a copy. I did not know until this day that there was even something in my file on it.

Then, as Keith Fiola further credibly testified, Fleming asked the reason for the bad blood or bad feelings in the plant. Keith Fiola mentioned his association with the Union. Fleming said, "Wait a minute, we're not talking about the Union," but added, "Well, rumor has it that you have a union bumper sticker on your car." Keith Fiola responded, "Well, it's pretty obvious, you walk by my car every day to go to your truck" and "Yes, I do have a union bumper sticker on my car. That's not against—." Fleming interrupted, "Oh, I didn't say it was against the rules. I was just wondering," and then said, "Okay, well, we're going to stop talking about the Union now" and sent him back to work. (Tr. 49–50, 74–75.)

Fleming admitted on cross-examination that he told Keith Fiola in this meeting that "it's been rumored that you've got a bumper sticker on your car" (Tr. 946–947).

*b. Fleming's "Documentation"*

The document that Fleming prepared and placed in Keith Fiola's personnel file was entitled "Documentation" and read (GC Exh. 10 p. 1):

> On the morning of October 25, 1999 at approximately 7:30 a.m., I brought Keith Fiola upstairs to ask about a situation that was brought to my attention on Friday, October [22], 1999. It was said that Keith had instructed recently hired production *people* to discard product that should not have been thrown away. *The throwing away of quality ground beef would have been considered*
>
> *1. Destruction of company property*
>
> *2. Interference with production*
>
> *which would have resulted in termination.* Keith explained that he did not instruct any personnel in this manner. He told them if they found ground beef with any foreign material on it, they should throw that piece away and that piece only. It was said that he would not do this because he has been here since day one and knows better. We also discussed various causes of tension on the production floor, including instances that had happened that he was uncomfortable with. All of those instances will be discussed [with] his supervisor and handled accordingly. He was also instructed that this conversation would be documented, he would be able to review it, and then he and I would sign off on it. [Emphasis added.]

Fleming attached to the documentation two statements. On direct examination, he merely testified that "if I remember correctly," Quality Assurance Manager Bill Wilkinson brought the documents to his attention. When asked what he did "to investigate or to follow up," he answered that "these documents were basically accusations made against Keith Fiola" and "I simply brought Keith upstairs." (Tr. 844–845.) On cross-examination he admitted that he had instructed Wilkinson to take the statements. (Tr. 920–921, 924–925). When Wilkinson testified at the trial as a defense witness, he did not mention these statements.

The first statement, signed by new employee Karen Deree, read (GC Exh. 10 p. 2):

> I was instructed by Keith Fiola on Friday Oct 22 that on the rework table I was to *throw away any product that touched the table* or had big pieces of styrofoam in it. [Emphasis added.]

Thus this statement, which Fleming claimed was a reason for taking Keith Fiola to the office for questioning, accuses him of wrongfully instructing *only one employee*, Karen Deree. Fleming falsely claimed in the meeting with Keith Fiola that packout "girls" had said he told them to throw away perfectly good meat (Tr. 70–72). Then in Fleming's "Documentation" of the conversation, Fleming falsely stated that it was said that Keith Fiola had instructed recently hired production "people" to discard product.

Furthermore, as Fleming admitted at the trial, the rework table is a sanitized stainless steel table, "the rework table is a table that we do rework on," and "you have to open the packages in order to get the ground beef out in order for the product to be reworked" on the table (Tr. 929–931, 934, 936). The Company does not offer any explanation for Fleming's even suspecting that Keith Fiola could have instructed Deree "to throw away meat that touched the table."

The second statement, written by Wilkinson and attached to the Documentation, was a statement signed by Jay Pacheco on Friday, October 22. It read (GC Exh. 2, p. 3):

> On several occasions most recently today Oct 22 1999 I attempted to instruct recent & newly hired employees on the proper procedure for reworking product. I was always rebuffed & treated rudely by Keith Fiola. He told other employees to ignore my efforts. I have been with Excel Taunton since the very 1st day of production & learned much about teamwork & good work practices & was only doing my part to help.

Fleming admitted at the trial that it was not Pacheco's job to instruct employees and that she was complaining that Keith Fiola was "interfering with her instructions of employees" when it was not her job to instruct them. Fleming testified, "I wasn't holding Keith responsible" for doing something wrong. When asked why he put Pacheco's statement in Keith Fiola's personnel file rather than in Pacheco's file, Fleming answered, "I don't know," it was just one of the "two statements that Wilkinson gave me. That's all." He claimed there was no "purpose of attaching" Pacheco's statement. (Tr. 938–939, 945.)

Although Fleming informed Keith Fiola in the office and stated in the Documentation that throwing away of quality ground beef would be "Destruction of company property" and "Interference with production" would result in termination, Fleming implied that the documentation was not a warning. He claimed it was "just a conversation basically," with "no disciplinary action connected to" it. To the contrary, however, Production Supervisor Picanco admitted that Fleming, without checking with him about doing so, told him that Fleming had given Keith Fiola a "warning" for throwing meat away. (Tr. 679–680, 849.)

*c. How incident arose*

Pacheco revealed what happened that Friday, October 22.

After Keith Fiola left for the day, Pacheco and others worked overtime until 6 p.m. In Keith Fiola's absence that afternoon, there was an excessive amount of ground meat—over 100 pounds—in the discard bucket (Tr. 413–414).

It is undisputed, as Pacheco credibly testified, that Quality Assurance Manager Bill Wilkinson asked her the reason for the excessive amount of discarded meat. She explained to Wilkinson and Production Supervisor Picanco that new employee Karen Deree, working at the rework table, "didn't have any clue on what she was supposed to be doing" and that (antiunion) employees Joseph Pereira and Ryan Redican were "just throwing the whole package" of meat in the discard bucket instead of just the spoiled part. She explained that at a Mondini machine (where Redican worked and where open meat that touches the machine must be discarded), they were not "cutting off the proper percentage" of the meat—not cutting "off some that touched the machine" and keeping the good part. (Tr. 168, 188, 256, 414–416, 499–500, 603, 628.)

Pacheco told Wilkinson about Keith Fiola being upset with her for telling Karen Deree how to process the meat and that "Keith was telling her to do the opposite." Wilkinson asked Pacheco to "make a statement about Keith" and then talked to Karen Deree. Pacheco did not overhear Wilkinson's conversation with Deree. (Tr. 413, 415, 418.)

At the end of the day, when Administration Manager Gail Thornton was in Wilkinson's office, Wilkinson called Pacheco in and told her to sign a statement that he had prepared regarding Keith Fiola—but not about (antiunion) employees Pereira and Redican, whom Pacheco had said were improperly discarding the meat. As Pacheco testified, she thought she was supposed to write a statement in her own words, but that "didn't happen." She "browsed through it . . . the lights were going out" and "I didn't want to disclose that to Kathy [Kathleen Carvalho, who was with Pacheco] because she's one of the operators that works with Keith. So I didn't want her to tell Keith," and "I signed it." (Tr. 416–418.)

It is undisputed, as Pacheco credibly testified, that before she signed the statement, Wilkinson told her (Tr. 418–419):

> "[T]his paper here was going to be one of the reasons of the violation against [Keith Fiola], work violations to let him go. They *needed two statements to fire him*. . . . *He's going to be out, him and [Tamila Fiola]*. . . . [Wilkinson] talked to Steve [Fleming], and *Steve said that [Wilkinson] would have to get two statements for a violation of the rules to let Keith go*. [Emphasis added.]

*d. Finding of discriminatory warning*

The complaint alleges that the October 25 "Documentation" was a discriminatory warning to Keith Fiola.

As found, Fleming instructed Wilkinson to take the two statements that Fleming attached to the documentation, stating that Fleming "would have to get two statements for a violation of the rules to let Keith [Fiola] go" and that Keith and Tamila Fiola were "going to be out."

As it turned out, both statements proved to be insufficient for discharging Keith Fiola. The one taken from new employee Karen Deree was an obviously erroneous accusation that he instructed her "to throw away any product that touched the [rework] table," which was where the ground meat was reworked. When Fleming reported the accusation to Keith Fiola in the October 25 office meeting, Fleming misrepresented the accusation, falsely claiming that the packout "girls" had stated Keith Fiola "told them to throw away perfectly good meat."

The statement that Wilkinson prepared for Pacheco to sign accused Keith Fiola of telling employees to ignore Pacheco's instructions to new employees "on the proper procedure for reworking product." Fleming admitted at the trial that it was not Pacheco's job to instruct the employees.

Yet in the documentation, to which Fleming attached the two statements, Fleming falsely stated that it was said that Keith had instructed recently hired production "people" to discard "product that should not have been thrown away" and warned that throwing away quality ground beef would be *destruction of company property* and that *interference with production would result in termination*.

Ignoring Pacheco's credited testimony that Wilkinson revealed to her that Fleming had said he "would have to get two statements for a violation of the rules to let Keith go," the Company contends in its brief (at 45) that "even if it is found" that "placement of witness statements in Keith Fiola's personnel file" was a disciplinary act, "there was good cause for the action." I disagree.

Particularly in view of the credited evidence (1) that Keith Fiola was the leading union organizer at the plant, (2) that Production Supervisor Picanco told Pacheco 2 days earlier that he was going to get rid of Keith and Tamila Fiola, stating "they're weeding out people" and "they won't have a [union] problem no more," and (3) Fleming's telling Picanco at the time that he had given Keith Fiola a "warning" about throwing meat away, I find that the Documentation was a discriminatory warning placed with the attached statements in Keith Fiola's personnel file to build a case for discharging him, to undercut the Union's majority.

I therefore find that the General Counsel has shown by a preponderance of the evidence that Keith Fiola's protected union activity was a motivating factor in the Company's issuing the discriminatory warning. *Wright Line*, 251 NLRB 1083 (1983). I further find that the Company has failed to meet its burden of proof that it would have issued him the warning in the absence of his union activity.

I therefore find, as alleged in the complaint, that issuing the warning to Keith Fiola was discriminatory and violated Section 8(a)(3) and (1) of the Act.

4. Keith and Tamila Fiola's October 27 discharge

*a. Valuable employees*

Keith Fiola, employed August 2 with No. 1 seniority, was trained for almost a month by a factory representative on the important Bizerba machines, which weigh and place top and bottom labels on the various grinds and sizes of packaged ground beef. From the beginning, he was paid the skilled rate of $10.50 an hour. In the absence of any other fully trained Bizerba operator, he had worked very long hours, including 12 hours a day, 7 days a week, in a 3-week period. (Tr. 24, 78, 89, 436; GC Exh. 2, p. 6.)

Fleming testified that Keith Fiola was "a valuable member of our squad" and that he told Keith Fiola how "valuable" he was to the team (Tr. 80, 922).

Keith Fiola not only performed the essential Bizerba work, but performed other work, helping other employees, relieving employees on break, and staying behind and helping set up machinery. Fleming admitted that Keith Fiola "picked up [knowledge of other machines] through working with machines and working with the people that operated them." Keith Fiola also gave employee Kathleen Carvalho some instruction how to load and fix problems with the Bizerba machines. She received no training from a factory representative. She worked in Keith Fiola's absence, with the assistance of Production Supervisor Picanco. (Tr. 24–25, 81, 89–90, 128–131, 750–751, 922.)

Tamila Fiola was employed September 2 and later moved to the job of operating a Mondini machine, which gas-flushes the meat and heat-seals the packages of ground beef. Both Picanco and Plant Manager Fleming often told her they were very proud of her work because she got the line 2 Mondini machine to actually work. As she credibly testified, "Before I was on the machine, it would be down for hours at a time. When I took over, there was hardly any downtime." Picanco testified that the Mondini operator is "the first or second most important" employee on the production line. (Tr. 149, 206, 580–581.)

*b. Discharge of Keith Fiola*

On Monday night, October 25–26 (after Keith Fiola's discriminatory warning that Monday morning), Keith and Tamila Fiola were delayed returning from a professional wrestling match. Arriving home after 1 a.m., Keith Fiola left a message on the Company's answering machine, stating in relevant part, "We just got back in. . . . I'm not going to come in with only 3 hours of sleep, so I'm just letting you know that I'm calling in sick . . . myself and my, my wife." (Tr. 61–63, 75–77, 113, 195–196, 963–964; R. Exhs. 3, 37.)

If Keith Fiola had not called in for the unpaid sick leave, and was a "no-call, no-show" (usually an unexcused absence), the maximum discipline under the Company's progressive-discipline policy would have been a three-point verbal warning. (The disciplinary action policy calls for a first written warning upon an accumulation of six points, a second written warning for nine points, and termination for 12 points in a 365-day period.) (Tr. 668, 882–885, 958, 963, 1217; GC Exh. 2, pp. 11–12.)

When Production Supervisor Picanco received the call-in message that morning, he rearranged assignments of production employees and notified Plant Manager Fleming of the absences. He recommended that Keith and Tamila Fiola be "written up"—given a three-point verbal warning for their first unexcused absence. As he admitted at the trial, he did not consider employees' calling in sick when they are "not really sick" to be a falsification, because "they want to let them know they're not going to be in," and "that doesn't really mean they're ill." (Tr. 161, 182–183, 584–585, 658, 660–661, 667, 683–684, 858, 953–955.)

Even though both Fleming and Administration Manager Gail Thornton admitted at the trial that Keith Fiola was not claiming that he and Tamila Fiola were actually sick, they treated the call-in as a falsification, for "calling in sick if they weren't really sick." As Thornton admitted, yes, she concluded when she heard Keith Fiola's recorded message that "he was telling [her] that he was not sick." (Tr. 970, 1196, 1198.)

The employee handbook provides, under Personal Conduct," that "All forms of dishonesty or falsification are prohibited" and that "Violations of these policies will result in disciplinary action *up to* and including *discharge* [emphasis added]." After first claiming that he understood that an employee should be discharged for falsification, Fleming admitted that "falsification is not an automatic discharge" and that "You consider the circumstances." I discredit Thornton's claim, at one point: "Other than termination for misrepresentation there are no options." (Tr. 899, 985, 1232; R. Exh. 1, pp. 15–16.)

Evidently to find out if this call-in could be used as a pretext for discharging Keith and Tamila Fiola, Gail Thornton went home at lunch and brought in her personal tape recorder to make a recording of Keith Fiola's message, to play to David Wessling at Corporate headquarters in Wichita, Kansas. Wessling is the vice president of Human Resources for the entire Excel Corporation, which has about 20,000 to 25,000 employees. Thornton admitted that she had never talked to Wessling about an attendance problem before. (Tr. 1121, 1181, 1187–1189, 1234–1235.)

Upon hearing the tape, as Thornton admitted, Corporate Vice President Wessling told Thornton "it's misrepresentation," they "need to be terminated," and yes, that was "a decision" to terminate Keith and Tamila Fiola. Wessling also pointed out they are "probationary employees." (Tr. 1188–1189, 2000.) I discredit Thornton's later denial that Wessling told her to terminate Keith Fiola (Tr. 1230). Her credibility is discussed below.

All employees in the Taunton plant were considered probationary employees because they had been there less than 90 days. Fleming admitted that the employee handbook "applies to employees whether they're probationary or nonprobationary employees." Thornton agreed that the disciplinary system applies to probationary employees. (Tr. 960–961, 1203–1204, 1210; GC Exh. 2, p. 3.)

I discredit Fleming's claim that he did not know why Thornton called Corporate Human Resources, even though Fleming admitted at one point that Thornton "said she was going to" and later said she had spoken to Wessling and got his "opinion" (Tr. 900–901). I also discredit Fleming's claim "I don't know" if Corporate has a policy regarding the Union at the Taunton plant, even though the employee handbook "was made by someone from Corporate" and the handbook states a commitment to a union-free environment (Tr. 906–907).

The next morning, Wednesday, October 27, first Keith Fiola and then Tamila Fiola were called into Thornton's office to meet with Thornton and Fleming (Tr. 78–79).

When Thornton talked to Keith Fiola about falsifying his call-in message, he asked if he was supposed to call in that he was sleepy or dead tired? He explained that "sick" was just his "terminology" for calling in. "It does not mean I was physically sick." Thornton then said it was an "unexcused absence." Keith Fiola responded that if it was an unexcused absence, "it should be a verbal warning" according to the employee handbook. Thornton stated, "That still doesn't matter, you falsified." Keith Fiola then responded, "What did I falsify? I did not falsify nothing. It was just my terminology." When he asked, "How many people have you fired in the past for calling in sick?" Fleming answered, "Well, none." (Tr. 79–83; GC Exh. 2, pp. 11–12.)

Fleming told Keith Fiola to leave the room and wait in the hallway (near Debra Nechesnoff's desk); "we're going to decide what we're going to do with you." Thornton admitted that Fleming "wasn't very comfortable with" discharging Keith Fiola. Fleming tried first to contact Brad Brown, director of human resources at Corporate headquarters in Wichita. When Brad Brown was not available, they next tried to contact other human resources officials or managers, Bruce Ansheets, Vice President Wessling, and Kenneth Fleming, but none of them could be reached. Then, after talking to the accounting manager at the facility, Fleming filled out personnel action record discharge forms for both Keith and Tamila Fiola. (Tr. 83, 145, 830, 865, 869, 1075–1076; GC Exhs. 3, 4.)

During the 30 to 45 minutes that Keith Fiola was waiting in the hallway, Debra Nechesnoff spoke to him. Nechesnoff was the human resources clerk, who was trained by Corporate Assistant Human Resources Manager Stacy Norton to conduct employee orientations and by Norton and Thornton—as well as through telephone instructions from Corporate human resources—concerning human resources functions. Thornton admitted at one point, "I asked Debra Nechesnoff" about what Corporate attendance policy was "as applied in the handbook" and asked Nechesnoff to "write up a letter" to an employee who was "having some attendance problems," explaining the Corporate policy. (Tr. 145, 305–306, 1092–1096, 1107; GC Exh. 5, pp. 8, 16.)

Among her many human resources duties assisting Thornton, Nechesnoff conducted orientation of Tamila Fiola and other new employees, informing them of their benefits and other terms of employment. She was a spokesperson for the Company concerning employees' terms of employment and company policy, and also assisted Thornton by answered questions about their benefits. She prepared and signed correspondence, informing employees that they were

hired. Also in Thornton's absence, Nechesnoff carried out daily human resources functions. (Tr. 150, 305–306, 1092–1097, 1160, 1165–1166, 1169; GC Exhs. 8, 17, 22–23.)

Debra Nechesnoff revealed that she had inside knowledge of Corporate plans for discharging union supporters. As Keith Fiela credibly testified, she told him while he was waiting (Tr. 84–85):

> I knew that they were getting rid of you anyways because . . . they were on the phone [with Corporate] all week long talking about . . . how Gary [Clay, the Company's assistant vice president for operations] did not want a union in the plant, and . . . . Gary said, "If there's a union member in that plant, get rid of him." And . . . . You need to get yourself a good lawyer.

On cross-examination Keith Fiola gave further details. He credibly testified, as elicited by the Company's corporate counsel (Tr. 143–145, 1263):

> Q. [By Mr. Overman] And tell us again what you say that Deb said to you.
>
> A. Debbie said that she had heard . . . about how they were talking about how the union people were trying to get the Union in the plant and how Gary said to get rid of them. And she said that they were making contact with Corporate all week . . . she said she didn't know who they were speaking about, but about getting rid of somebody and *checking the rules* about something.
>
> . . . .
>
> Q. And in reference to Gary, what does Deb say?
>
> A. Deb made comment about how the other day that Steve [Fleming] and him were having a conversation about union people being in the plant and . . . he stated to "Get rid of those people."
>
> Q. Did she say when that conversation took place?
>
> A. No, she didn't. She said, "the other day."
>
> Q. Do you recall anything else she said in that part of the conversation?
>
> A. She said, "Find a lawyer," because I was getting screwed.
>
> . . . .
>
> Q. You said she had some other part of the conversation where she said that there had been conversations she overheard?
>
> A. About—Yeah; that they were *checking up on some different rule and how they could apply it towards me*, and that, she said, happened *the day prior* [Tuesday, October 26, when Keith Fiola called in].
>
> Q. So she overheard—
>
> A. She said she didn't know who it applied to, but she said they . . . called Corporate and was going over one of the rules or something, and she didn't know who it was applying to; but she said, "I guess I know who it was applying to now." [Emphasis added.]

When Keith Fiola was called back in the office, as Keith Fiola credibly testified, Thornton told him, "Because you're on your probationary period," they are going to terminate him.. He asked them the reason for the point system in the handbook, if they were jumping from a three-point verbal warning "right to termination." Fleming responded, "That's [Corporate Assistant Human Resources Manager] Stacy Norton's stupid thing she thought up. I am not following that. You are a probationary employee." (Tr. 86–88.)

Fleming first testified, "Not that I recall no," did he say that "Stacy Norton made up the handbook and that he did not have to go by that." He then denied saying anything about not having to go by the handbook. (Tr. 871.) I discredit the denial. I credit the testimony of Keith Fiola, who impressed me most favorably as a truthful witness.

*b. Discharge of Tamila Fiola*

When Keith Fiola came from the office, Gail Thornton was standing there and said, "Come on Tamila, you're next" (Tr. 181).

In the office, as Tamila Fiola credibly testified, Fleming discussed her absence and said "they're going to have to terminate me for unexcused absences and falsifying a statement" (Tr. 181–182):

> And [Fleming] said, "You're not going to say anything?" Because I kept my mouth shut the whole time.
>
> I said, "I have nothing to say."
>
> And he said, "Well, what's your opinion of this?"
>
> And I said, "I think it's bullshit. . . . *I think the reason why you're firing me is because you knew that Keith and I were in the Union*."
>
> He said, "That's not true."
>
> I said, "Yes, it is. . . . Because on Monday . . . you asked Keith about the bumper sticker. . . . Steve, all you had to do was walk out the door. . . . Right whenever you walk out the door, there's our car. It's on the back windshield. You can't tell me you never saw it."
>
> And he said, "Well . . . I'm not firing you because of the Union."
>
> I said, "Well then what are you firing me for?"
>
> He said, "I'm firing you for unexcused absences." [Emphasis added.]

At that point Tamila Fiola was flipping through the employee handbook that she picked up from Thornton's desk. Fleming asked what she was looking for (Tr. 182–183):

> I said, "Because. . . . I never missed a day that I haven't brought in an excuse or something. . . . So this would be my first unexcused absence. . . . By your handbook, an unexcused absence is only three points. So three points equals one verbal warning."
>
> I said, "You're skipping . . . and going straight to termination."
>
> And Steve said, "That's not my handbook. It's Corporate's handbook. . . . I don't go by that handbook. . . . *This is my decision*."
>
> . . . .
>
> And Gail [Thornton] said, "Well, you're a probationary employee, so it's up to our discretion on what we're gonna do. . . . Here's the paper. Please sign it right here." [Emphasis added.]

In Thornton's handwritten notes to the file "documenting my speaking to Tamila Fiola with Steve Fleming on the morning of October 27," she admitted that because Tamila Fiola "was still a probationary employee," that was one of the "grounds [we explained] for termination" her (Tr. 1079; R. Exh. 36).

After Tamila Fiola refused to sign the discharge sheet (GC Exh. 4), received a copy, and went downstairs, Debra Nechesnoff met her at the cafeteria door. They walked from the cafeteria into the cooler, where Nechesnoff told her "we've got to keep this out of the camera" (in the cafeteria) and said, "You're being screwed." (Tr. 183–186.) Nechesnoff explained (Tr. 186–187):

> I overheard them on Friday trying to figure out a way to get rid of somebody. . . . But I really did not know it was you and Keith. . . . I heard them in the conference room, Gail and Steve [Fleming] on the phone to Corporate, trying to figure out some way to fire somebody; and I

> didn't know it was you and Keith. . . . The other day, I was walking by Steve's office. . . . And Steve and Gary [Clay] were talking. I overheard Steve say, "We've got some union people in here that are trying to get a union" [and] Gary said, "Fire 'em". . . . Get a lawyer, because you're being screwed.

Neither Vice President Wessling nor any of the other human resources officials or managers at Corporate headquarters in Wichita testified.

Plant Manager Fleming's superior, Gary Clay, who was directly responsible for the operations at the Taunton plant, testified that a quality problem occurred in early October and that almost the entire month of October, he "would be in on Monday, out on Thursday and Friday." Although he admitted that he tried to speak to all the plant employees and had firsthand knowledge of what was going on in the plant, he claimed that he did not learn that anybody was talking about the Union. (Tr. 526, 553–554.)

Clay admitted that if a union campaign was going on at the plant, it would be the responsibility of the plant manager to notify him. Yet he claimed that Fleming did not at any time he spent at Taunton tell him "that the Union was trying to organize the employees." He did not appear to be a truthful witness. I discredit his denial that he ever told Fleming to "get rid of union people." (Tr. 529–530, 555–556.)

Regarding Gail Thornton's credibility, I specifically discredit as fabrications her testimony that (1) "I have no idea" if Corporate was for or against having a union in Taunton, (2) "To be honest I didn't read that part" of the employee handbook, referring to the statement on the first page, under "*A WORD ABOUT UNIONS*," that the Company "has committed to its employees to maintain a union-free environment," (3) "I saw that it said a word about unions but I honestly never read that," (4) "I do not know" whether the Company "is for or against a union at the Taunton plant," and (5) "The only time it's come up" was when Fleming made the statement "I think the Union's here" (Tr. 1173–1176).

Like Production Supervisor Picanco, Gail Thornton by her demeanor on the stand, appeared willing to fabricate whatever might seem plausible to support the Company's defenses.

5. Company's shifting positions

*a. Discharge decision at plant or corporate level*

Until the last day of the trial, the Company endeavored to conceal Corporate's decision to discharge Keith and Tamila Fiola.

In the Company's November 24 position statement to the Regional Office, Gail Thornton stated—without any reference to Wessling's decision to discharge Keith and Tamila Fiola—that "Steve Fleming and I" discussed the appropriate discipline for them and "*We decided* [emphasis added] that the facts justified termination." When asked why she made no reference in the statement to Wessling's involvement, she claimed (less than a month after the discharges), "I just didn't recount it at the time." (Tr. 1233–1235; GC Exh. 25, p. 5.)

As late as January 15, 2000 (the 4th day of the trial), the Company took the position that Fleming, or both Fleming and Thornton, made the decision at the plant level to discharge Keith and Tamila Fiola.

Fleming testified January 15 that on Tuesday, October 26 (after receiving Keith Fiola's call-in message earlier that morning), Fleming returned upstairs from the production floor. He claimed that Gail Thornton then told him that she had (already) called Corporate for "assistance" in "her" decision-making process, had played the tape (of Keith Fiola's call-in message) to Corporate Vice President Dave Wessling, and had tried to get some "assistance in what we needed to do." He claimed that Thornton said she was going to have to get back to Wessling for his "recommendations." (Tr. 853–856.)

Fleming claimed that at the end of the day that Tuesday, October 26, he asked Thornton if anybody from Corporate had called her back and given her "suggestions on what we needed to do." Thornton said yes, there was "grounds for potentially severe disciplinary action, I guess up to and including termination" and we needed to talk with the employees before work the next day. (Tr. 856–857.)

Fleming further testified that on Wednesday morning, October 27, after talking to Keith Fiola and having him wait outside, he and Thornton "took quite awhile" discussing "difference options, suspension, termination" and going "back through the handbook." Then after discussing it with the accounting manager in the facility and talking about Corporate's "recommendation" from Dave Wessling, Fleming "made the decision to fire them," as Thornton recommended. (Tr. 864–865, 954, 962, 964–965.)

Fleming admitted "it is not necessarily my position to directly discipline the employees. That's to their supervisors to do in a normal case." As found, Production Supervisor Picanco had recommended that Keith and Tamila Fiola be "written up"—given a three-point verbal warning for their first unexcused absence. Fleming also admitted that if both Keith and Tamila Fiola had been a "no-call, no-show" and had told Picanco that Wednesday they "didn't come in yesterday because [they] had three hours sleep and [they] didn't want to operate heavy equipment," that "If that would have been the case I'm sure [Picanco] could have" excused that absence (with no discipline). (Tr. 883, 958.)

On January 16, 2000 (the last day of trial), the Company shifted its defense. Administration Manager Gail Thornton then admitted that the decision to discharge Keith and Tamila Fiola was made at the Corporate level—contrary to her November 24 position statement to the Regional Office (that she and Fleming made the decision) and contrary to Fleming's testimony the day before (that he made the decision, as Thornton recommended).

Thornton revealed her limited role in human resources. She testified that as "administration manager," she was also responsible for (1) information technology, (2) purchasing, (3) customer service, (4) accounting, and (5) the lab "with the support of" Corporate in Wichita. She admitted that on terminations, "I do not make that decision. I am [Human Resources] support, local HR support for Taunton. I am still in a training situation. I do not have the expertise of an HR person." (Tr. 977, 1119–1121.)

Thornton further admitted, as found, that Corporate Vice President Wessling made the decision to terminate Keith and Tamila Fiola after she brought her personal tape recorder from home after lunch that Tuesday, October 26, and played him Keith Fiola's call-in message that "We just got back in. . . . I'm not going to come in with only 3 hours of sleep, so I'm just letting you know that I'm calling in sick . . . myself and my, my wife." (Tr. 1187–1189; R. Exhs. 3, 37.)

*b. Reasons for discharges*

After Corporate Vice President Wessling made the decision to terminate Keith Fiola (the leading union organizer in the Taunton plant) and his wife Tamila Fiola (who assisted in the organizing), it was the responsibility of Plant Manager Fleming and Administration Manager Thornton to call them in, prepare the discharge papers, and discharge them.

After hearing Keith Fiola's explanation that calling in "sick" (for unpaid sick leave) was just his terminology, not meaning he was "physically sick," and his insistence, "I did not falsify nothing," Fleming and Thornton had him wait outside. As found, Thornton admitted (although Fleming did not) that Fleming "wasn't very comfortable with" discharging Keith Fiola and tried unsuccessfully to call Wessling's superior, Human Resources Director Brad Brown at Corporate headquarters.

The purpose of this call is not revealed. From the circumstances, I infer that Fleming was concerned that discharging this leading union organizer for such a purported violation would appear to be an obvious pretext, that discharging him would adversely affect production because he was the only a fully trained operator on the essential Bizerba machines, or both.

Regarding the resulting disruption of production, Production Supervisor Picanco testified on cross-examination (Tr. 662, 676):

> Q. [By Mr. Grant] The Company fired them?
> A. Yeah, that's what [Keith and Tamila Fiola] said.
> Q. So, [you] lost these two . . . essential people, on the machines?
> A. Yes.
> Q. But nobody even bothered to tell you until noon?
> A. Yeah, until after the fact.
> Q. What did you do for the rest of the week?
> A. I busted my ass, me and Steve [Fleming] did. We ran the rest of the week like that until we could train someone.

Q. So, it must have caused a disruption to your operation and made your life more difficult to have these two people fired on these essential machines?

A. Oh, yeah, it did.

The discharge of Keith Fiola deprived the plant of any fully trained operator on the essential Bizerba machines, which weigh and place top and bottom labels on each package of ground beef that is processed on the two production lines. The discharge of Tamila Fiola deprived the plant of a Mondini operator, who Picanco earlier testified is "the first or second most important" employee on the production line (Tr. 580–581).

During the long wait, Fleming prepared a Personnel Action Record discharge sheet. In the space for the "Supervisor" to fill in, Fleming checked under Violation, (1) "Attendance Policy," with the Description, "Personnel Conduct—All forms of dishonesty or falsification are prohibited" and (2) "Other violations," with the Description, "Unexcused Absences [plural]." Thornton signed as the "Personal Director" and Fleming signed as the "Plant Manager," leaving blank the space for the supervisor's signature. Keith Fiola refused to sign it. (Tr. 865; GC Exh. 3A.)

Attached to the sheet is the personnel action authorization form for termination, prepared by Thornton, stating as the Reason for Termination: "Failure to report for work, Attendance issue, Probationary employee." Fleming signed the form in the space for "Supervisor's Signature" and Thornton signed in the space for "Human Resources." (Tr. 961–962, GC Exh. 3B.)

For Tamila Fiola, Fleming and Thornton prepared similar discharge papers, stating identical violations (GC Exhs. 4A and B).

Thus the stated reasons for discharging both Keith and Tamila Fiola were (1) "falsification" (although only Keith Fiola, not Tamila Fiola, placed the purportedly false call-in message), (2) "Unexcused Absences" (although this was their first unexcused absence, for which the prescribed discipline was a three-point verbal warning), and (3) "Probationary employee" (although all the employees were probationary employees for the first 90 days).

As found, these were the same reasons Fleming and Thornton gave Keith and Tamila Fiola when discharging them on October 27.

By the time of trial, the Company had shifted its positions on these purported reasons.

Regarding (1) "falsification," both Fleming and Thornton, as found, admitted that Keith Fiola was not claiming in the call-in message that he and Tamila Fiola were actually sick. In fact, Thornton admitted that she concluded that Keith Fiola "was telling [her in the message] that he was not sick." Yet, both Fleming and Thornton still contended that his words, "calling in sick," were a falsification. Regarding only Keith Fiola having made the call, Fleming contended that Tamila Fiola also engaged in the falsification because her husband "made a claim for both of them on the message." (Tr. 956, 962–967, 970, 1189, 1191, 1196, 1198.)

Regarding (2) "Unexcused Absences," Fleming claimed that the plural, "Absences," was a hurried mistake, an accident. Both Fleming and Thornton adopted the position at the trial that "falsification" (misrepresenting facts) was the sole reason for discharging Keith and Tamila Fiola, and unexcused absence was not a reason (Tr. 952–956, 960, 962, 1190).

Regarding (3) "Probationary employee," Fleming and Thornton agreed at the trial that this was not a reason for discharging Keith and Tamila Fiola (Tr. 961, 1209).

Thus, although Keith Fiola's call-in message clearly informed the Company that he and his wife were not coming in because they would have "only 3 hours of sleep"—not because they were physically ill—the Company discharged them because Keith Fiola used the terminology, "calling in sick" (for unpaid sick leave).

6. Disparate treatment

By requiring the Company to discharge leading union organizer Keith Fiola and his wife, Corporate apparently was taking the position that the employee handbook mandated discharge for even an ambiguous statement that might be considered a falsification.

Two months later, Corporate permitted the Company to give a written warning to, and not discharge, a leading antiunion employee who not only called in sick when he himself was not ill, but deliberately falsified safety records kept for the USDA and left work early without permission. Administration Manager Thornton admitted that by that time ("recently" before the trial) Corporate had instructed her to contact Corporate human resources "when dealing with employee issues" (Tr. 1090–1091, 1120), and Plant Manager Fleming confirmed that Thornton talked to Corporate Human Resources (Tr. 899).

The employee was Bernard Abdelnour, who assisted Quality Assurance Manager Bill Wilkinson in quality assurance work. Regarding Abdelnour's opposition to the Union, Keith Fiola credibly testified that Abdelnour was "totally against" the Union and went around to people and asked, "Did you sign a card?" When a prounion employee complained, Keith Fiola told Abdelnour, "Listen, I don't care what you're doing, but reporting back who signed cards and who didn't sign cards . . . is not going to get you a blue [supervisor] hat . . . any quicker than working hard is going to get you." Abdelnour responded, "Yeah, well joining the Union isn't going to get you much further than kicked out the door." (Tr. 40–41, 1298–1299.) Abdelnour did not testify.

On December 21, when Abdelnour heard about his infant son being in the hospital, he deliberately falsified a HACCP (Hazardous Analysis of Critical Control Points) record, which is kept for inspection by the USDA. He left the job early without permission and without punching out, after falsely certifying that a critical control operation (a grinder breakdown) had been performed as a safety measure. Wilkinson admitted that "a serious health hazard to the public" could have resulted. Fleming admitted that falsification of the HACCP form would be a "serious infraction" of company policies. (Tr. 843, 874–876, 891–893, 1301–1309, 1319–1320.)

In addition, Wilkinson admitted that in the afternoon on the next day, December 22, when Abdelnour was scheduled to come in, he "called in sick" although "He actually was not sick. His infant son was sick." (Tr. 1306.) On cross-examination, Wilkinson gave conflicting testimony. He claimed, "I don't think [Abdelnour] used the word sick. He just used I'm not going to be able to work today," and then claimed that he did not have a specific recollection of what Abdelnour said. (Tr. 1322.) Because of his earlier positive testimony on direct examination that Abdelnour "called in sick" although "He actually was not sick," I discredit his later claims.

Instead of discharging Abdelnour, Fleming wrote out a final "Written Warning" for "Left early" and "*Possible* [emphasis added] falsification of HACCP documents," omitting any reference to "calling in sick" when not sick. (Tr. 1300–1301, 1312; GC Exh. 26.) Regarding the purported "Possible" falsification, Thornton admitted that it was a falsification "pure and simple" (Tr. 1256). Wilkinson also admitted it was a falsification and claimed "I do not know" why Fleming said it was a "possible" falsification (Tr. 1317–1318).

This discipline of the antiunion Abdelnour is in sharp contrast with the discharge of prounion Keith and Tamila Fiola for a questionable falsification by "calling in sick" because of only 3 hours sleep.

The Company failed to discharge Abdelnour for a deliberate falsification (which could have resulted in a serious health hazard to the public and which was a "serious infraction" of company policies), calling it a "possible" falsification, and for leaving early—completing ignoring Abdelnour's "calling in sick" the next day when he was not sick. The employee handbook provides that "Leaving work early without consent from your supervisor is considered 'walking off the job' or voluntarily quitting" (R. Exh. 1, p. 12). Wilkinson admitted that "Leaving early is . . . automatically abandonment of job and discharge offense" (Tr. 1321).

Thus, contrary to its decision to require the Company to discharge leading union organizer Keith Fiola and his wife for a questionable falsification, despite the need for their essential services in production, Corporate permitted the Company to retain the antiunion Abdelnour.

This is obviously disparate treatment.

7. Concluding findings—Motivation to undercut union majority

As found, Corporate furnished an employee handbook for use at the new plant, stating the Company "has committed to its employees to maintain a union-free environment." Plant Manager assured the employees that he "wanted to run [the Company] as a family," he "could take good enough care of the employees," and "you don't need a union." His efforts, however, were undercut by high employee turnover resulting in long working hours, causing low morale.

In an October 6 meeting, when Fleming reminded the employees that he was trying to run the Company "like a family" and to straighten out the long hours, only Keith and Tamila Fiola spoke up. Tamila Fiola told Fleming, "I'm about this far from joining the Union." After the meeting, one of the union supporters arranged a union meeting and Keith Fiola "told pretty much everybody."

The first indication of company animus toward Keith and Tamila Fiola for their union activity was on the next morning when Production Supervisor Picanco stopped speaking to them.

That evening, October 7, after Fleming repeated his opposition to the Union in another employee meeting, Keith and Tamila Fiola were the only employees who attended the Union's first meeting. They signed union authorization cards and Keith Fiola became the leading union organizer, known in the plant as the "union steward" or "shop steward." Tamila Fiola assisted in the organizing.

The first indication that plans were being made to discharge Keith Fiola occurred the next evening, October 8, when Picanco told a group of antiunion employees that he was going to take care of Keith Fiola, "It was in the making," and "they were going to take care of the troublemakers."

By the time of the October 14 employee meeting, support of the Union was growing. Fleming told the employees he had "tried running the Company as a family" and "that did not work," so he was going to run it "as a Company" and would "go by the book." He admits telling employees in the meeting that "if Tamila got fired tomorrow I wouldn't feel bad for her at work," but "outside of work I could feel horrible for her," pointing out that "business is business and personal is personal." When Tamila Fiola responded, "Well, hey Steve, is this your nice way of telling me I'm fired?" Fleming just chuckled.

On October 18 or 20, Production Supervisor Picanco told a group of union supporters that "If the Union comes in, I'm going to make your lives a living hell."

On Friday, October 22 (the morning after the Union's third meeting), the Company revealed its awareness that the Union had obtained signed authorization cards from a total of 21 of the 32 employees, a 65-percent majority of the 32 employees at the time—by Picanco asking leading union organizing leader Keith Fiola, "I heard you got 21 cards signed?" That afternoon Fleming instructed Quality Assurance Manager Wilkinson to obtain two statements against Keith Fiola, telling Wilkinson they needed "two statements to fire him."

One of the statements was from antiunion employee Jan Pacheco, who was supplying information about union supporters directly to Fleming and Picanco. Before this, Fleming told Pacheco that the union supporters were all going to go if "they signed those [union] cards."

The next day, October 23, Picanco told Pacheco he was *going to get rid of Keith and Tamila Fiola* and another employee, stating "they're weeding out people" for "wanting to be in the Union" and "they won't have a problem no more."

On Monday, October 25—although the accusations in the two statements Wilkinson took were insufficient for discharging Keith Fiola—Fleming called Keith Fiola into his office and warned him that "destruction of company property" and "interference with production" would result in termination. Fleming placed a discriminatory warning and the two statements in Keith Fiola's personnel file to build a case for discharging him, to undercut the Union's majority.

The next day, October 26, a decision was made to discharge Keith and Tamila Fiola. Keith Fiola called after 1 o'clock that morning and left the message: "We just got back in. . . . I'm not going to come in with only 3 hours of sleep, so I'm just letting you know that I'm calling in sick . . . myself and my, my wife."

Instead of leaving it to Production Supervisor Picanco's discretion to decide whether the absence of Keith and Tamila Fiola would be an excused absence or whether they should be given a three-point verbal warning for their first unexcused absence, Thornton consulted with David Wessling, one of the top human resources officials at Corporate headquarters in Wichita, Kansas. Wessling is the vice president of human resources for the entire Excel Corporation, which has about 20,000 to 25,000 employees in United States, Canada, and Australia. Thornton admitted that she had never talked to Wessling about an attendance problem before.

Regarding who made the decision to discharge Keith and Tamila Fiola, the Company took shifting positions.

Until January 16, 2000 (the last day of the trial), the Company endeavored to conceal the fact that Corporate made the decision to discharge the two union supporters. Thornton claimed in her November 24 position statement—without making any reference to Wessling's involvement—that she and Fleming decided "that the facts justified termination." As late as January 15 (next to last day of trial), Fleming claimed he made the decision.

On Sunday, January 16, 2000 (at the further extended trial), the Company shifted its defense and admitted that the discharge decision was made at the Corporate level, not the plant level.

Thornton then admitted that she went home at lunch on October 26, brought in her personal tape recorder, make a recording of the call-in message, and played it to Wessling. Thornton admitted that upon hearing the tape, Wessling told her "it's misrepresentation," they "need to be terminated," and yes, that was "a decision" to terminate Keith and Tamila Fiola.

Thornton also admitted, in effect, that there was no falsification, by testifying that yes, she concluded when she heard Keith Fiola's recorded message "he was telling [her] that he was not sick."

Even if there were an actual fabrication, the employee handbook provides that violation of the rule prohibiting falsification will result in disciplinary action "up to" discharge. Fleming admitted that "falsification is not an automatic discharge."

Fleming also admitted that "You consider the circumstances" in determining disciplinary action. Except for the discriminatory warning given Keith Fiola 2 days earlier "to build a case for discharging him," there had been no previous disciplinary action taken against either Keith or Tamila Fiola, and both of them were admittedly valuable employees, needed for their essential services in production.

Apparently in an attempt to justify the decision to discharge Keith and Tamila Fiola, Fleming and Thornton informed them, and stated in the discharge papers, that they were terminated not only for purported "falsification," but also for "Unexcused Absences" and because each was a "Probationary employee." At the trial, the Company again shifted its defense. Both Fleming and Thornton admitted that Keith and Tamila Fiola were not terminated for any unexcused absence or because they were probationary employees.

When Keith Fiola asked the reason for them jumping from a three-point verbal warning for unexcused absence in the handbook point system, "right to termination," Fleming responded, "That's [Corporate Assistant Human Resources Manager] Stacy Norton's stupid thing she thought up. I am not following that. You are a probationary employee." When Tamila Fiola similarly protested, "You're skipping . . . and going straight to termination," Fleming responded, "That's not my handbook. It's Corporate's handbook. . . . I don't go by that handbook. . . . This is my decision."

The evidence is clear that Corporate's decision, requiring the Company to discharge leading union organizer Keith Fiola and his wife for a questionable falsification, despite the admitted need for their essential services in production, constituted disparate discipline when compared to the discipline of a leading antiunion employee, Bernard Abdelnour.

Employee Abdelnour not only called in sick in December when he himself was not sick, but made a "pure and simple" falsification. He falsified a record kept for inspection by the USDA, falsely certifying that a critical control operation had been performed—a safety violation that could have resulted in "a serious health hazard to the public" and which Fleming admitted would be a "serious infraction" of company policies. Abdelnour also left the job early without permission and without punching out. His supervisor, Quality Assurance Manager Bill Wilkinson, admitted that under the employee handbook, "Leaving early is . . . automatically abandonment of job and discharge offense."

Instead of requiring that Abdelnour be discharged, Corporate permitted the Company to give him a final warning for leaving early and for what Fleming described in the discharge papers as a "Possible falsification," and to simply ignore the sick call-in when Abdelnour himself was not sick. This was obviously disparate treatment of union supporters and an antiunion employee.

Concerning motivation for their discharge, Keith and Tamila credibly testified what human resources clerk Debra Nechesnoff told them on Wednesday, October 27, the day they were discharged. As more fully developed by Corporate counsel in his cross-examination of Keith Fiola, Nechesnoff revealed the following:

> (a) That the "other day" she overheard Fleming and Company Assistant Vice President of Operations Gary Clay having a conversation about union people being in the plant and Clay stating, "Get rid of those people."
>
> (b) That Fleming and Thornton were "making contact with Corporate" all week, "talking about how the union people were trying to get the Union in the plant," about how Clay "said to get rid of them," and "about getting rid of somebody."
>
> (c) That on Friday, October 22 (the day Fleming instructed Wilkinson to take two statements against Keith Fiola because they needed "two statements to fire him"),

she overheard Fleming and Thornton in the conference room on the phone to Corporate, "trying to figure out some way to fire somebody."

(d) That on Tuesday, October 26 (when Keith Fiola made the early-morning call-in and Corporate Vice President Wessling made the decision to terminate him for "misrepresentation"), she overheard Fleming's and Thornton's conversations with Corporate, "going over one of the rules" (presumably concerning "falsification" or probationary employees) and "how they could apply it toward" someone, and "I guess I know who it was applying to now."

Nechesnoff was obviously not speaking as an agent of either Corporate or the Company when revealing what had happened in the office. As the human resources clerk, however, she was in a good position to have first-hand knowledge of motivation for the discharge of Keith and Tamila Fiola. I find that the credited testimony concerning what she told them at the time of their discharge is reliable, probative evidence and that it is corroborated by much other evidence. I therefore reject the Company's contention in its brief (at 65–66) that the testimony is "uncorroborated and unreliable hearsay evidence." I find that the evidence is admissible. *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994); *RJR Communications*, 248 NLRB 920, 921–922 (1980).

I find that the General Counsel has shown by a preponderance of the evidence that the protected union activity of Keith and Tamila Fiola was a motivating factor in the Company's discharging them. *Wright Line*, 251 NLRB 1083 (1980). I particularly rely on the following:

1. The Company's stated commitment in its employee handbook to maintain a "union-free environment."

2. Plant Manager Fleming's statement to the employees, when support of the Union was growing, that he had "tried running the Company as a family" and "that did not work," so he was going to run it "as a Company" and would "go by the book," and "if Tamila [Fiola] got fired tomorrow I wouldn't feel bad for her at work," but "outside of work I could feel horrible for her."

3. Fleming's telling antiunion employee Jan Pacheco that the union supporters were all going to go if "they signed those [union] cards."

4. Production Supervisor Picanco's not speaking to Keith and Tamila Fiola after Tamila Fiola stated in a meeting, "I'm about this far from joining the Union," and after Keith Fiola "told almost everybody" about the scheduled first union meeting.

5. Picanco's telling a group of antiunion employees that he was going to take care of Keith Fiola, "It was in the making," and "they were going to take care of the troublemakers."

6. Picanco's telling a group of union supporters, "If the Union comes in, I'm going to make your lives a living hell."

7. Picanco's revealing the Company's knowledge that a total of 21 of its 32 employees, a 65-percent majority, had signed union cards, by Picanco's asking Keith Fiola on Friday morning, October 22, "I hear you got 21 cards signed?"

8. Fleming's instructing Quality Assurance Manager Wilkinson that Friday afternoon, October 22, to obtain two statements against Keith Fiola because they needed "two statements to fire him."

9. Picanco's telling antiunion employee Pacheco the next day that he was going to get rid of Keith and Tamila Fiola and another employee, stating "they're weeding out people" for "wanting to be in the Union" and "they won't have a problem no more."

10. Fleming's placing a discriminatory warning in Keith Fiola's personnel file to build a case for discharging him, to undercut the Union's majority.

11. Fleming's attempting to justify the discharge of Keith and Tamila Fiola by stating at the time of discharge that they were terminated not only for "fabrication," but also for "Unexcused Absences" and because each was a "Probationary employee."

12. Fleming's and Administration Manager Thornton's shifting of defenses at the trial, admitting that Keith and Tamila Fiola were not discharged for any unexcused absence or because they were probationary employees.

13. Fleming's telling Keith and Tamila Fiola that it was not his handbook, it was Corporate's handbook, and he did not follow it, when they protested being discharged for excused absence instead of being given only a 3-point verbal warning under the employee handbook point system.

14. Fleming's and Thornton's claiming that they discharged Keith and Tamila Fiola on October 27 for "falsification" because Keith Fiola called in after 1 a.m. on October 26 leaving a message, "We just got back in. . . . I'm not going to come in with only 3 hours of sleep, so I'm just letting you know that I'm calling in sick . . . myself and my, my wife." His call-in was the next morning after Fleming gave him the October 25 discriminatory warning. Thornton admitted, in effect, that there was no falsification, by testifying that yes, she concluded when she heard Keith Fiola's recorded message "he was telling [her] that he was not sick."

15. Fleming's admission that "falsification is not an automatic discharge." Even if there were an actual fabrication, the employee handbook provides that violation of the rule prohibiting falsification will result in disciplinary action "up to" discharge.

16. Fleming's admission that "You consider the circumstances" in determining disciplinary action. Except for the discriminatory warning given Keith Fiola 2 days earlier "to build a case for discharging him," there had been no previous disciplinary action taken against either Keith or Tamila Fiola. Both of them were admittedly valuable employees, needed for their essential services in production.

17. Fleming's and Thornton's claiming before the last day of the trial that either Fleming, or Fleming and Thornton, made the decision to discharge Keith and Tamila Fiola.

18. Thornton's admitting on the last day of the trial that Corporate made the decision to discharge Keith and Tamila Fiola.

19. Corporate's requiring the Company to discharge union supporters Keith and Tamila Fiola for a questionable "falsification," but not requiring the Company to discharge antiunion employee Abdelnour 2 months later. Abdelnour not only called in sick when he himself was not sick, as well as left work early without permission and without punching out, but also falsified a record kept for

> inspection by USDA. The falsification was a safety violation that could have resulted in "a serious health hazard to the public" and which Fleming admitted would be a "serious infraction" of company policies. This was obviously disparate discipline of union supporters and an antiunion employee.
>
> 20. Corporate's motivation for requiring the Company to discharge leading union organizer Keith Fiola, as well as his wife, was to undercut the Union's majority.

Because of the above corroboration, and having found that the credited hearsay testimony of Keith and Tamila Fiola of what human resources clerk Nechesnoff told them at the time of their discharge is reliable, probative evidence, I give some weight to it in determining the Company's unlawful motivation when discharging them.

In view of this credible evidence, I find that the Company has failed to meet its burden of proof that it would have discharged Keith and Tamila Fiola in the absence of their union activity

I therefore find, as alleged in the complaint, that the Company discriminatorily terminated Keith and Tamila Fiola in violation of Section 8(a)(3) and (1). The complaint does not allege that Corporate, the parent company, also engaged in the unlawful conduct.

*C. Discharge of Union Organizer Michael Paiva and Two Other Employees*

1. Overview

The discharge of leading union organizer Keith Fiola and his wife on Wednesday, October 27, left union organizer Michael Paiva on the job. Paiva was well known as a union supporter because he was the only employee (besides Keith and Tamila Fiola) who had a UNION YES bumper sticker on his vehicle. (Tr. 51, 294; GC Exh. 7, 13.)

Antiunion employee Jan Pacheco reported to work early that Wednesday morning, October 27, before the Company discharged Keith and Tamila Fiola (Tr. 511–512). As found, Pacheco had been promised a lead position on the upcoming second shift and was supplying information about union supporters directly to Plant Manager Fleming and Production Supervisor Picanco.

Pacheco was absent the day before. Upon her arrival on October 27, Picanco told her what had transpired and said that "whoever signed the [union] card was going to be let go." He then told her, "Find out who signed the cards for the Union." (Tr. 511–512.) I discredit Picanco's denials (Tr. 600).

On October 27, however, something happened that caused the Company to discharge antiunion employee Pacheco, as well as union organizer Paiva.

As discussed below, the Company had been receiving Pinkerton investigative reports that some of the new employees had a previous worker's compensation claim. Neither Administration Manager Thornton nor clerk Debra Nechesnoff, who assisted Thornton in performing her human resources responsibilities, had checked to see whether these employees—all of whom were reported "Medically recommended without restrictions"—had disclosed a previous compensation claim on the health history questionnaires they filled out when taking their physical exams. For the first time that day, the Company requested copies of certain questionnaires be sent to it.

One of the questionnaires it requested was that of union organizer Michael Paiva. It is a small-print questionnaire (dated August 27), which states at the bottom (also in the small print) that "any *known* misstatement *may* [emphasis added] result in employment termination."

On October 7 (20 days earlier), the Company had received a Pinkerton report, showing that Paiva previously had a hernia injury and received weekly pay of $173 from January 24 to February 14, 1994. On October 27, the same day the Company discharged Keith and Tamila Fiola and requested a copy of Paiva's questionnaire, the Company received a faxed copy of the questionnaire. The Company found that Paiva had failed to disclose the previous compensation claim on his questionnaire.

Although Paiva had revealed the hernia operation to the examining physician, Corporate instructed the Company to discharge him.

Plant Manager Fleming testified "I don't know" what "criteria is applied when falsification is established," whether "it will be a termination or something less." He also testified "I don't know" where the policies are set forth by Corporate's Human Resources (at its Wichita, Kansas headquarters)" about whether falsification is a dischargeable offense" or "a warning offense," and "There's probably nothing written like that." He further claimed, "I do not know" how it is decided when Corporate will be consulted about a discharge." (Tr. 897–898.) No one from Corporate's human resources department in Wichita testified.

The problem facing the Company was that it had also received a Pinkerton report on August 17 showing that Pacheco as well had a worker's compensation claim, in 1996. The Company had not requested a copy of her July 7 questionnaire, to check if she disclosed the previous compensation claim. On October 27 it requested a copy of the questionnaire. Upon receiving a faxed copy that same day, it found that she had not disclosed a previous compensation claim. Corporate instructed that she likewise be discharged.

On November 2 the Company received a Pinkerton report that Ernest Watson (employed since October 11) had a 1994 worker's compensation claim. This time the Company immediately requested and received that same day, November 2, a faxed copy of Watson's questionnaire (dated September 24), showing that he had not disclosed a previous compensation claim. The Company did not discharge him until 3 weeks later on November 23, which was the day before Gail Thornton signed the Company's position statement to the Regional Office, asserting that "Other employees [besides Michael Paiva] have in a similar manner been discharged for violation of [Corporate] Excel's 'falsification of records' policy."

The General Counsel contends in his brief (at 81–82) that "Pacheco was discharged to cover up the unlawful discharge of Paiva" and that Watson was discharged to "camouflage the unlawful discharge of Paiva." The Company contends in its brief (at 56):

> Though some production employees occasionally discussed the union issues at the plant and testified that they attended a few union meetings after work, the record is void of any connection between this activity and the terminations of Michael Paiva, Ernest Watson, and Jan Pacheco."

2. Discharge of Michael Paiva

*a. His union activity*

Employed since September 23 and being trained as a Risco operator, Michael Paiva attended the Union's second meeting on October 14 and received a package containing a union key chain, pen, pencil, bumper sticker, notepad, car trash bag, and booklet about the Union. Like Keith and Tamila Fiola, he placed the UNION YES bumper sticker on his vehicle, which was parked "Right outside" the front door. He placed the other union material in his locker. He also began handing out union authorization cards to employees at the plant and talking to these and other employees about the Union. (Tr. 289, 293–295, 316, 321, 330–333, 520–521; GC Exhs. 6, 7, 13.)

The next morning after the October 14 union meeting, Production Manager Picanco (contrary to his denial) asked Paiva if he had gone to the meeting. Paiva told him no, but Picanco continued to ask him, for a total of five or six times. Although Paiva did not admit that he had attended the union meeting, the evidence is clear that the Company was aware that Paiva was supporting the Union. (Tr. 297–298, 378, 600.)

Thus, as discussed below, the Company had obtained proof that Paiva was a union supporter when Quality Assurance Manager Wilkinson opened the lock on his clothes locker before his discharge and confiscated his property, including all the union material he had placed there. Also, as antiunion employee Pacheco credibly testified, Michael Paiva was one of the union supporters that Picanco told her "they're going to get rid of" (Tr. 408).

*b. His incorrect questionnaire*

Like other new employees, Paiva was required as part of the physical examination process at Morton Hospital's Occupational Health Service (OHS), to fill out a two-page health history questionnaire containing 57 questions in English and Spanish, in small print. (Tr. 307–308, 328–329, 985–986; GC Exh. 5 pp. 18–19; R. Exh. 7.)

Paiva credibly testified that as he was filling out the questionnaire, "I wasn't halfway through" and "I got called into another room" and "continued filling out the questionnaire," on which the writing was "very small" (Tr. 307–308).

Paiva (Tr. 307–311, 324–326; GC Exh. 5 pp. 18–19; R. Exh. 22 pp. 3–6) correctly checked (with a slash) Yes to questions

> 42. Have you ever been in a hospital?
> 43. Have you ever had surgery?" [he previously had shoulder surgery].

He also correctly checked No to questions

> 15. Do you have any abnormal bulges in your groin or abdomen or any active hernias?
> 57. Do you presently have a disability that would affect your ability to work?

He, however, incorrectly checked No to questions

> 40. Are you presently in good health?" [although he was in good health].
> 52. *Have you ever been injured at work and the medical bills paid for by your employer?* [Emphasis added.]

At the bottom of the August 27 questionnaire, Paiva signed a statement stating, also in the small print, "I hereby certify that all information above is full, true and correct to the best of my knowledge and I understand that any *known* misstatement *may* [emphasis added] result in employment termination" (Tr. 327–328; GC Exh. 5, p. 18).

In the physical examination that followed, the physician checked for a hernia and noticed a hernia operation scar. He asked if Paiva had had a hernia. Paiva said yes, back in 1994, when he was picking up boxes of thread. The physician completed the examination, "told the nurse that everything was fine," and signed a medical recommendation form, indicating "Medically recommended without restrictions," which was sent to the Company. OHS retains the questionnaires on file. (Tr. 308–309, 327, 329, 986, 989–990; GC Exh. 5, p. 11; R. Exh. 7 last page.)

Paiva credibly testified that by checking No to question 52, he "not in any way [meant] to mislead the Company" (Tr. 307–308).

Before Wednesday, October 27, when the Company discharged leading union organizer Keith Fiola and his wife as directed by Corporate, the Company had never followed up on any Pinkerton report that a new employee had a previous worker's compensation claim. The Company had not requested OHS to send a copy of an employee's health history questionnaire to check if the employee correctly answered question 52, "Have you ever been injured at work and the medical bills paid for by your employer?" (GC Exhs. 5, 11; R. Exhs. 10, 11, 16, 19, 23.)

Since October 27, however, each time the Company receives a Pinkerton report that a new employee had a previous worker's compensation claim, it immediately requests OHS to send a copy of the employee's questionnaire. OHS sends a faxed copy the same day of the request. If the employee has answered question 52 correctly, the employee is retained, regardless of the size of the claim. (Tr. 1005–1009; R. Exhs. 12, 13 (for $11,137.65), 36.)

Before October 27, the Company did not request a copy of employee Maria Sousa's questionnaire when it received a Pinkerton report on September 22, showing that she was paid a lump sum settlement of $21,500 on October 31, 1997, for a worker's compensation claim. The Company did not discharge her then, or when it requested (in preparation for trial) and received a faxed copy of her August 16 questionnaire on January 12, 2000, showing that she had answered Yes to question 52. (Tr. 1000, 1049; R. Exh. 25.)

Thornton claimed at the trial that she had seen a copy of Sousa's questionnaire before January 12, 2000, claiming "I don't know the date but sometime" and "I believe it's been misfiled or it may have been discarded" (Tr. 1048–1049). As discussed below, I discredit these claims as additional fabrications.

*c. His October 29 discharge*

Paiva's long questionnaire indicated on its face that he may not have intended to mislead the Company. He incorrectly answer No to question 40, "Are you presently in good health?" Yet by Friday, October 29 (2 days after the Company received the copy of Paiva's questionnaire with the incorrect answer to question 52), Corporate—before giving him an opportunity to explain—decided to require that the Company discharge him.

Administration Manager Thornton gave various versions of what happened after she received a copy of Paiva's questionnaire on October 27 (Tr. 1034–1038, 1151–1159, 1245–1246). She finally admitted, however, "I called him in *to explain to him that he was being terminated* [emphasis added]" (Tr. 1258). She admitted that when Corporate "Decided termination," they were talking about both Jan (antiunion employee Jan Pacheco, whose discharge is discussed below) and Mike (Michael Paiva) "at the same time" (Tr. 1156).

Paiva credibly testified that while he was working on the afternoon of October 29, Production Manager Picanco told him to go upstairs and see Plant Manager Fleming. When he got upstairs, Administration Manager Thornton told him to go in the conference room and Fleming and Thornton came in. Thornton said she had a copy of his health history questionnaire and the Pinkerton report, which stated he had a hernia back in 1994, and he never put it on his questionnaire. Thornton said it was grounds for termination. (Tr. 312–313.)

On cross-examination Paiva credibly confirmed that he said he "did not even remember [when filling out the questionnaire] that [he] had a work-related injury back in 1994" and that what he stated in his pretrial affidavit was true (Tr. 317–320, 327):

> On October 29, 1999, I was terminated. [Picanco] told me he had a call, and I was to meet Fleming. I went upstairs. Gail Thornton was there and told me to go to the conference room. Fleming and Thornton sat down with me and said, "When you started working here, there was a form you filled out that [there] would be a security check on you." She . . . . said, "the paper came back from Pinkerton saying you had a Worker's Comp case in 1994." I said, "I did not even remember that." She said, "they were on the phone for most of the day with Wichita [the Corporate office] seeing if they could do something to get around this to keep me there because I was a good worker, and they would hate to see me go." They both said their hands were tied. They said Wichita told them it would have to be a termination.
>
> Fleming said again, "we would like to keep you aboard, but we just can't do it." Gail said it was too bad because it was such a small amount I collected [$173 paid weekly from January 24 to February 14, 1994], but that was the way it would have to be.

The personnel action authorization form shows that Paiva was terminated October 29 for "Falsification of work records" (GC Exh. 5, p. 21).

*d. Company's shifting positions*

Thornton took shifting positions on why the Company had failed to request copies of new employees' health history questionnaires to check if they disclosed previous worker's compensation claims reported by Pinkerton.

Thornton claimed that it was the responsibility of human resources clerk Debra Nechesnoff (who was not a witness) to request copies of the questionnaires when receiving Pinkerton reports of previous compensation claims. Thornton claimed (Tr. 1000–1001, 1005, 1025, 1043):

> It's my fault. . . . I did not follow up with my clerk to make sure that these documents were requested. . . . It was an oversight on my part and just plain old just not good work.
>
> . . . .
>
> It seems like we're just not doing a good job of following up on these and I'm to blame. I'm not following up on my clerk making sure she's doing that. So it's just sloppy work. There's just no excuse for it.
>
> . . . .

> Once again just I did not follow up on this and just bad work.
>
> . . . .
>
> Again I say I didn't follow up with my clerk and just it's just sloppy work.

Finally on cross-examination, however, Thornton admitted that she was not even aware of what the followup was on the Pinkerton reports, and that she had "no idea what [Nechesnoff] was supposed to do with these" until "I would say maybe in October I think." Thornton testified that Nechesnoff started maintaining a binder reporting system for Pinkerton reports the first part of August. She also testified that Stacy Norton, Corporate's assistant human resources manager (who began doing the orientation of employees at the plant) had mentioned to Thornton "the paperwork involved for getting background checks" and "was going to show me what to do and how to administer it but I was busy and she said she would show Deb [clerk Debra Nechesnoff]." (Tr. 1235–1237.)

Thornton also testified that she knew OHS would do the Company's physical examinations of new employees, but admitted that she was not aware that questionnaires were "attached to those physicals" until she got "the Pinkerton result back for Paiva" (Tr. 1238). She later explained that on October 27 (the date leading union organizer Keith Fiola and his wife were discharged), Nechesnoff "brought to my attention that Jan Pacheco and Michael Paiva had Pinkerton results." Thornton testified (Tr. 1242–1245):

> Q. The records show that Mr. Paiva's Pinkerton report came on October 7th and Miss Pacheco's Pinkerton report came in in August.
>
> A. Correct.
>
> Q. Did Miss Nechesnoff tell you why she was coming to you then [on October 27] to tell you?
>
> . . . .
>
> A. She said I have a Pinkerton result back on these two people, Jan Pacheco and Michael Paiva, and here are those OHS [health history] questionnaires and we looked through them and saw that they contradicted each other.
>
> . . . .
>
> Q. Did you ask Miss Nechesnoff why she was only coming to you then?
>
> A. No, I did not.
>
> Q. Did you have any question in your mind why she was coming to you then?
>
> A. No, I did not.
>
> . . . .
>
> Q. The timing of the Company's action with regard to following up on these Pinkerton reports is a mystery to you.
>
> A. Yes, sir.

Thus, Thornton claimed she had no idea why Nechesnoff showed her the questionnaires on October 27, the same day the Company discharged Keith and Tamila Fiola. The Company had failed to request copies of questionnaires for over 2 months since it began receiving Pinkerton reports of previous workers' compensation claims. Thornton did not reveal what caused the Company to begin requesting copies on that date.

Thornton obviously was seeking to conceal the fact that on the day the Company discharged Keith and Tamila Fiola, it requested copies of the questionnaires of Paiva, Pacheco, and certain other employees whose Pinkerton reports showed previous compensation claims (GC Exh. 5; R. Exhs. 11, 19, 23), which are faxed to it the same day as the requests.

The evidence does not reveal why the Company did not request questionnaires of other employees whose Pinkerton reports had shown previous compensation claims. The Company did not request until January 2000 a copy of Carlos Alvarado's August 26 questionnaire, even though it had received his Pinkerton's report on October 25 (2 days before requesting Paiva's questionnaire) showing that Alvarado had a previous compensation claim, nor a copy of Deanna Harrison's July 9 questionnaire, even though it had received her Pinkerton's report on August 17, also showing that she had a previous claim (R. Exhs. 10, 16).

Thornton also took shifting positions regarding when she learned about checking the Pinkerton reports with the employees' questionnaires. She at first unequivocally admitted that she learned about the questionnaires and the follow-up system when she got "the Pinkerton result back for Paiva"—when Nechesnoff showed her the Pinkerton reports and the questionnaires of Paiva and Pacheco on October 27, as discussed above. But then she withdrew the admission and testified that "no," it was not then and claimed that she "knew about [the follow-up system] with Maria Sousa." (Tr. 1238–1239.)

As found, Thornton claimed that she had already seen a copy of employee Sousa's questionnaire before January 12, 2000, when she received the copy in evidence (R. Exh. 25). Thornton claimed "I don't know the date but [I saw it] sometime" and "I believe it's been misfiled or it may have been discarded" (Tr. 1048–1049).

The following day at the trial Thornton gave purported details about having seen the questionnaire. She then claimed "I believe initially" Nechesnoff brought the Pinkerton report to her attention "around September 22" and "they said there was a foot injury with I think" a ($21,500) claim, and "It was important. Up to that point we hadn't had anything like that." Thornton further claimed that Nechesnoff (Tr. 1239–1240):

> said that she will call OHS and request a copy of her questionnaire that she took at her physical and the fax came back and we checked and looked at the box for workman's comp and at that point that's when I knew how to do the [follow-up] on Pinkerton results.

By her demeanor on the stand, Thornton appeared to be fabricating whatever might seem plausible to support the Company's defense.

I discredit these claims. I find that the Company did not request a copy of any employee's questionnaire from OHS to check it with a Pinkerton report of a previous compensation claims until October 27, the day it discriminatorily discharged union supporters Keith and Tamila Fiola, as directed by Corporate.

In fact, there is no evidence that Corporate had instructed the Company to request copies of the employees' OHS questionnaires if their Pinkerton reports showed previous worker's compensation claims. Corporate's assistant human resources manager Norton—who showed the Company's human resources clerk Nechesnoff, instead of Thornton, how to administer "the paperwork involved for getting background checks"—did not disclose in her testimony what she had instructed Nechesnoff. As indicated, Nechesnoff did not testify.

The Company makes no effort to explain, if Nechesnoff had been instructed to request copies of the questionnaires, why she was performing other human resources duties for Thornton, but never request any of the copies in a period of over 2 months.

Having considered Thornton's admission on cross-examination (1) that she had "no idea what [Nechesnoff] was supposed to do with" the Pinkerton reports until "I would say maybe in October" and (2) that she learned about the questionnaires and the followup system when she got "the Pinkerton result back for Paiva," I discredit her claim that Nechesnoff had the responsibility to request copies of the questionnaires when receiving Pinkerton reports of previous worker's compensation claim.

*e. Disparate treatment*

Corporate required the Company to discharge union organizer Michael Paiva for "falsification" on October 29, apparently taking the position—as it did in requiring the Company to discharge leading union organizer Keith Fiola and his wife 2 days earlier—that the employee handbook mandated discharge as the only discipline for any falsification violation.

As indicated, the employee handbook provides, under "Personal Conduct," that "[a]ll forms of dishonesty or falsification are prohibited" and that "Violations of these policies will result in disciplinary action *up to* and including *discharge* [emphasis added]." As also indicated, the questionnaire that Paiva signed states at the bottom that "any *known* misstatement *may* [emphasis added] result in employment termination." Neither provision mandates discharge for even an intentional falsification.

As found, Plant Manager Fleming testified that he was not aware of anything in writing or what criteria is applied to determine if an employee should be terminated for falsification, instead of a lesser discipline.

Yet, over the opposition of the Company, Corporate required the discharge of Paiva, even though his mistaken No answer to question 40, "Are you presently in good health?" indicated that he may not have intended to mislead the Company. Moreover, Corporate made the discharge decision before giving Paiva the opportunity to explain his incorrect No answer to question 52, whether he had a previous compensation claim, and before he explained that he did not remember the 1994 hernia injury (until the examining physician asked him about his hernia operation scar).

Obviously Corporate's requiring the Company to discharge union organizer Paiva—like its requiring the Company to discharge Keith Fiola and Tamila Fiola—is disparate treatment of a union supporter and a leading antiunion employee, Bernard Abdelnour, 2 months later.

As found, Corporate permitted the Company to give a final written warning to, and not discharge, Abdelnour who deliberately falsified a safety record that is kept for inspection by the USDA, falsely certifying that a critical control operation had been performed, even though the falsification could have resulted in a serious health hazard to the public and was a "serious infraction" of company policies.

*f. Concluding findings—Motivation to undercut union majority*

In concluding arguments in its brief (at 48) the Company ignores the evidence that it received the Pinkerton report on October 7 and Paiva's health history questionnaire on October 27 (20 days later), the day it discharged leading union organizer Keith Fiola and his wife. The Company argues:

> After receiving the report [the October 7 Pinkerton report], Gail Thornton verified its contents with Occupational Health Services [obtaining from OHS Paiva's August 27 questionnaire on October 27] and then called corporate headquarters in Wichita, Kansas and spoke with [personnel in] Human Resources [who] *recommended* that Michael Paiva should be terminated. . . . Michael Paiva was terminated by Gail Thornton from his employment on October 29, 1999, for falsification of work records. [Emphasis added.]

Thus, in making this argument, the Company ignores (1) the timing of its requesting and receiving from OHS Paiva's questionnaire on October 27, the same day the Company discriminatorily discharged Keith and Tamila Fiola as directed by Corporate, and (2) Thornton's admission that instead of merely *recommending* that Paiva be terminated, Corporate made the decision to discharge Paiva. Thornton admitted, "I don't make that decision" (Tr. 1119) and repeated, "they're the ones [at Corporate Human Resources] that make the decision. . . . *I don't make that decision* (emphasis added)." (Tr. 1119, 1159.)

The Company contends in its brief (at 48) that "The record is void of evidence that on or about October 29, 1999, Gail Thornton [and the Corporate Human Resources personnel] were aware of any activity by Michael Paiva in support of a union."

In doing so, the Company ignores (a) credited evidence that Paiva was the only employee, besides Keith and Tamila Fiola, who placed the UNION YES bumper sticker on his vehicle, (b) Thornton's giving Quality Assurance Manager Wilkinson a list of lockers to be cleaned out, as discussed below, and the Company's obtaining proof that Paiva was a union supporter when Wilkinson opened the lock on Paiva's locker and confiscated the union material from his locker, and (c) antiunion employee Pacheco's credited testimony that Michael Paiva was one of the union supporters that Production Supervisor Picanco told her "they're going to get rid of."

Having ignored this evidence, the Company has suggested no reason for it to conceal this information from Corporate which, over the opposition of the Company, required it to discharge Paiva.

As found, the Company had never requested a copy of any employee's health history questionnaire from OHS to check with a Pinkerton report of a previous compensation claim until October 27, the day it discharged leading union organizer Keith Fiola and his wife, as directed by Corporate. There is no evidence why the Company requested the questionnaire of union organizer Paiva on that date, as well as the questionnaires of certain other employees but not others.

It would be mere speculation whether Corporate, seeking some basis for discharging Paiva, considered the possibility that he may have incorrectly answered one of the many questions on his OHS questionnaire and required the Company to request a copy of the questionnaire for that reason, or whether the Company contacted OHS for this information before requesting copies of some of the questionnaires.

The evidence is clear, however, that when the Company found the incorrect answer to question 52 on Paiva's questionnaire regarding a previous compensation claim, it contacted Corporate, which decided that he must be discharged for falsification, before giving him an opportunity to explain. Corporate treated him in the same way it did Keith and Tamila Fiola, taking the unfounded position that the employee handbook mandated discharge for any falsification and directed his discharge.

The Company had no policy against hiring employees who had a previous worker's compensation claim. It retained one employee who had received a $21,500 settlement in a previous compensation case, as compared to Paiva's compensation payment of $173 weekly from January 24 to February 14, 1994.

Also as with Keith and Tamila Fiola, Corporate directed the Company to discharge union organizer Paiva, but permitted the Company not to discharge a leading antiunion employee, Bernard Abdelnour, 2 months later for a deliberate falsification which could have resulted in a serious health hazard to the public and which was a "serious infraction" of company policies. This is obvious disparate treatment.

As found, Corporate's motivation for requiring the Company to discharge leading union organizer Keith Fiola was to undercut the Union's majority. I also find that Corporate had the same unlawful motivation for requiring the Company to discharge union organizer Michael Paiva.

I find that the General Counsel has shown by a preponderance of the evidence that the protected union activity of Michael Paiva was a motivating factor in the Company's discharging him. I also find that the Company has failed to meet its burden of proof that it would have discharge Michael Paiva in the absence of his union activity.

I therefore find, as alleged in the complaint, that the Company discriminatorily terminated Michael Paiva in violation of Section 8(a)(3) and (1).

3. Discharge of Jan Pacheco—To conceal unlawful motivation

As found, Jan Pacheco had been promised a lead position on the upcoming second shift and was supplying information about union supporters directly to Plant Manager Fleming and Production Supervisor Picanco. When she reported to work on Wednesday morning, October 27, before the Company discriminatorily discharged Keith and Tamila Fiola as directed by Corporate, Picanco told her, "Find out who signed the union cards for the Union," because "whoever signed the card was going to be let go."

That same Wednesday, October 27, however, the Company requested and received from OHS a copy of Pacheco's July 9 health history questionnaire showing that she, as well as Michael Paiva, had incorrectly checked No to question 52, "Have you ever been injured at work and the medical bills paid for by your employer?" (Tr. 1038–1039; GC Exh. 11, p. 14; R. Exh. 23, pp. 2–3.) As shown on Pinkerton's August 17 report, Pacheco had a previous worker's compensation claim in 1996 and was paid a lump sum settlement in 1997 for $1975 (GC Exh. 11, p. 13)—as compared to Paiva's weekly payment of $173 from January 24 to February 14, 1994.

Obviously this antiunion supporter of the Company could not be retained if the Company was to discharge union organizer Paiva.

Administration Manager Thornton discussed Pacheco's and Paiva's incorrect answers to question 52 with Corporate, which directed that the Company discharge both of them for "falsification" (Tr. 1245–1246). The following afternoon, Thursday, October 28, the Company discharged Pacheco (Tr. 1043–1044; GC Exh. 11, p. 16), and a day later, it discharged Paiva. At one point Thornton admitted, "I guess yes," when asked, "[I]f the Company wanted to fire one of those two people it would have to fire both if it were to uniformly apply its policies" (Tr. 1248).

In the discharge interview, Pacheco told Fleming and Thornton "I didn't recall anything that I put on this [July 7] questionnaire. " She explained, "I just check [the questionnaire]

randomly" and "All I did was check, check, check," because she "felt good" and "didn't feel that she needed to report anything like that." (Tr. 442–443, 1044.)

Pacheco credibly testified that in the meeting, they said "their hands were tied. They had to let me go" because Corporate "told them that they had to let me go for falsification." Fleming "had tears in his eyes, and said to me that this was the hardest thing that he had to do to let me go." (Tr. 443, 446.) Thornton admitted that Fleming "was very upset" about the decision to fire Pacheco (Tr. 1250.)

As found, the Company had no policy against hiring employees who had a previous worker's compensation claim. It retained employees who answered question 52 correctly, regardless of the size of the claim—two of the claims being for $11,137.65 and $21,500. Also, as found, the rule against falsification did not mandate discharge for a violation, as demonstrated by Corporate's permitting the Company 2 months later to retain a leading antiunion employee who deliberately falsified a safety record.

I agree with the General Counsel in his brief (at 81) that "Pacheco was discharged to cover up the unlawful discharge of Paiva," and that although "management did not want to terminate Pacheco, it had to do so . . . to appear to validate Paiva's discharge."

Having found that Corporate's motivation for requiring the Company to discharge union organizer Michael Paiva was to undercut the Union's majority, I find that Corporate had the same unlawful motivation when it required the Company to discharge antiunion Pacheco to avoid the appearance of disparate treatment of a union supporter and an antiunion employee.

I therefore find that the General Counsel has shown by a preponderance of the evidence that the union activity was a motivating factor in the Company's discharging Jan Pacheco. I also find that the Company has failed to meet its burden of proof that it would have discharged Pacheco in the absence of the union activity.

Accordingly I find, as alleged in the complaint, that the Company discriminatorily terminated employee Jan Pacheco.

The Company contends in its brief (at 41–44, 55–56) that as a matter of law, the claims of Pacheco and the other discharged employees must be dismissed because the employee handbook contains a Dispute Resolution Plan "that is the *exclusive* means through which employee/employer disputes are to be resolved," and the employees "failed to utilize and abide by the mandatory and binding dispute resolution process."

That plan (GC Exh., 2 p. 3) states, in part, "Neither the Company nor the Employee can sue the other *in any court* over differences based on a claim or dispute arising out of or related to their . . . termination of employment," and that the Company and Employees "are simply agreeing to resolve our dispute without resorting to suing one another *in a court of law*," but "does not waive anyone's substantive legal rights." [Emphasis added.]

Pacheco did refer her discharge to that plan, which was selected and financed by the Company. The president of the plan, Dispute Solutions, Inc., ruled in the Company's favor—as he did in previous cases—without a hearing and without considering any evidence of a possible unfair labor practice (Tr. 1044, 1060–1062; GC Exh. 12, p. 12; R. Exhs. 32–34). In his brief summary letter he wrote (GC Exh. 12, p. 12):

> Upon receipt of your dispute form, we contacted Excel Corporation [Corporate] to determine their response to your grievance.
>
> Excel provided copies of personnel forms, your employment application, your signed acknowledgement of the conditional offer of employment, and your background check. We did note that you stated that these answers [her answer to question 52] were due to inattention. However, in today's workplace, employers no longer have any latitude in considering such explanations. Employers are bound to strict interpretation of their personnel policies and procedure.
>
> Therefore, we find that your termination was due to inaccurately answering questions on your employment application [not a stated reason for her discharge].
>
> If you have any other information, which indicates otherwise, we will review our position.

Apart from whether it would effectuate the policies of the Act to permit an employer to require, as a condition of employment, employees to submit to a "mandatory and binding resolution process"—which is selected unilaterally by the employer—to resolve alleged unfair labor practices, I find that the Dispute Resolution Plan in the employee handbook does not include issues before the Board and does not supplant the Board's jurisdiction. I therefore reject the Company's contention that the claims of the discharged employees must be dismissed.

4. Discharge of Ernest Watson—To conceal unlawful motivation

On November 2, the Company received a Pinkerton report that Ernest Watson (employed October 11) had a worker's compensation claim for "Sprains/Strains to the Knee" in 1994. That same day—following the practice established on October 27 in its efforts to undercut the Union's majority—the Company immediately requested and received a copy of Watson's September 24 OHS health history questionnaire. It showed that he checked No to question 52. (Tr. 1265; GC Exh. 9, pp. 1, 8, 11; R. Exh. 26, pp. 1, 3.)

The Company did not interview Watson until November 22 (20 days later), when he advised Administration Manager Thornton and the warehouse supervisor (who did not testify) that "he felt good, when he filled out the questionnaire, and did not feel that he needed to report any injury he had in the past" (Tr. 1054–1055; GC Exh. 9, pp. 5–6).

The following day, November 23, the Company discharged Watson. This was the day before the Company submitted its November 24 statement, signed by Thornton, to the Regional Office, giving its position in defense of the Union's November 3 charge that the Company discriminatorily discharged Paiva. (Tr. 1259–1262; GC Exhs. 2A, 9, p. 12, 25.) The position statement read, in part (GC Exh. 25, p. 4):

> Other employees have in a similar manner been discharged for violation of [Corporate] Excel's "falsification of records" policy.

It is obvious that the Company made an effort to show that it had consistently followed that discharge policy *before* it submitted its *November 24* position statement in its defense for discharging Paiva. Thus, on November 24, Thornton and Plant Manager Fleming signed a personnel action authorization form for termination, stating that Watson was terminated *November 23* for "Falsification of Documents," with the notation: "Please *key this ASAP!* [emphasis added]. Thanks"—to place the discharge immediately on the Company's records (GC Exh. 9, p. 12).

The General Counsel contends in its brief (at 71) that the belated discharge of Watson (21 days after receipt of the Pinkerton report) "presented a clear case of disparate treatment in that there was a positive Pinkerton report [of a previous compensation claim] that had not been pursued." The General Counsel argues that by discharging Watson (the day before, not the same day) the November 24 statement "was presented to the Board," the Company "attempted to eliminate that disparate treatment" of Watson and union organizer Paiva.

Thornton gave the explanation that the 20-day delay, from November 2 until November 22, when she and the warehouse supervisor talked to Watson, was caused by her being busy and out of town several times (Tr. 1052–1054, 1273–1275). Because of lack of the urgency that the Company demonstrated when it previously discharged the four employees (Keith and Tamila Fiola, Michael Paiva, and Jan Pacheco) in a 3-day period in October (on October 27, 28, and 29), I discredit Thornton's explanation.

As with Keith and Tamila Fiola, Paiva, and Pacheco, Thornton admitted that Corporate makes the decision to discharge. She also admitted that discharge was not mandatory for a violation of the falsification policy. (Tr. 1119, 1159, 1258.)

Under these circumstances, I find that the General Counsel has shown by a preponderance of the evidence that the Company, as directed by Corporate, discharged Ernest Watson to conceal its discriminatory discharge of Michael Paiva to undercut the Union's majority. I also find that the Company has failed to meet its burden of proof that the Company would have discharged Ernest Watson in the absence of the union organizing activity.

I therefore find, as alleged in the complaint, that the Company discriminatorily terminated Ernest Watson in violation of Section 8(a)(3) and (1).

I note that the General Counsel did not allege that Corporate (Excel Corporation, the parent company) also violated Section 8(a)(3) and (1) by directing the Company to discharge Keith and Tamila Fiola, Michael Paiva, Jan Pacheco, and Ernest Watson.

I also note that next to the last day of the trial (Saturday, January 15, 2000), Thornton made the threat that Carlos Alvarado would be discharged because of her discovery, in preparation for trial, that he answered No to question 52 on his August 29 questionnaire, contrary to Pinkerton's October 25 report of a previous compensation claim. She testified that "what I will do is consult with Corporate like I have with all the other [employees] who . . . had been in a similar situation but *the outcome will be termination* [emphasis added]. (Tr. 1000–1003; R. Exh. 10.)

Making this threat, Thornton was adopting Corporate's unfounded theory, in requiring the discharge of Michael Paiva, Jan Pacheco, and Ernest Watson, that their discharge for incorrectly answering question 52 on their questionnaires was mandated by the employee handbook.

Although in making the threat, Thornton was obviously motivated by the Company's efforts to avoid the appearance of disparate treatment—if it retained Alvarado after discharging union organizer Michael Paiva—the General Counsel did not move to amend the complaint that weekend (when the trial was extended into Sunday) to alleged that the threat was unlawful.

### *D. Other Coercive Conduct*

#### 1. Surveillance of union activity

About Monday, October 18, as union supporters Keith Fiola, Michael Paiva, and Reginald Murphy credibly testified, Quality Assurance Manager Bill Wilkinson entered their lockers and confiscated various items the Union had given them.

As found, Paiva had attended the Union's second meeting on Thursday, October 14, and was given a package containing a union key chain, pen, pencil, bumper sticker, notepad, car trash bag, and booklet about the Union. Wilkinson had opened and removed the padlock from his locker and removed all these union items, except the bumper sticker that Paiva had placed on his vehicle, as well as the other items (Tr. 298–302, 315–317).

Wilkinson also unlocked Keith Fiola's locker and took only the union paraphernalia, which included a Shaw Supermarkets handbook (Tr. 49, 91–92).

Murphy, who does not use a padlock on his locker, had hidden the Union's Shaw contract book in the locker, "stuff[ing] it way behind my boots." After the shift he reached in the locker and the union book was gone. Nothing else was taken. When he questioned Wilkinson about going into his locker, Wilkinson "started denying it" but then admitted that he had. (Tr. 224–227.)

Wilkinson testified that Administration Manager Gail Thornton "requested that I clean out some lockers of some employees that were no longer employed at the Company" and "gave me a list and a booklet that had the locker numbers and combinations" (Tr. 1292–1293).

Wilkinson admitted that when Paiva (who was discharged the next week) came up to him and asked "why did you clean out my locker?" he answered "I did not realize that you were still here" (Tr. 1292–1293). He gave no explanation for not following Thornton's list of locker numbers of former employees. Wilkinson denied opening any locker that he knew was Keith Fiola's locker and denied removing anything from Murphy's locker (Tr. 1297–1298).

As found, Wilkinson was involved later that week in the Company's efforts to build a case for discharging Keith Fiola, to undercut the Union's majority. It is undisputed that he informed antiunion union employee Jan Pacheco on Friday, October 22 (3 days before Plant Manager Fleming issued Keith Fiola a discriminatory warning) that Fleming had told Wilkinson to get two statements against Keith Fiola because they needed "two statements to fire him."

I credit the testimony that Wilkinson confiscated the union materials from the three union supporters' lockers.

I find, as alleged, that the Company engaged in surveillance of union activities by searching employees' lockers and confiscating union materials, in violation of Section 8(a)(1) of the Act.

#### 2. Threat to eliminate 401(k) savings plan

Keith Fiola, who impressed me most favorably as a truthful witnesses, credibly testified that Corporate's assistant human resources manager, Stacy Norton, threatened the employees with the lost of their 401(k) payroll deduction saving plan, to become effective after 6 months of employment (GC Exh. 2, p. 4).

Keith Fiola testified that during the employees' orientation that began August 4, Norton said that the 401(k) plan, with the company-matching benefit, is a benefit for their nonunion plants (Tr. 15).

Norton denied threatening "employees with loss of benefits including the 401(k) plan if they selected a union to represent them," testifying "I know I wouldn't have said that because in [Corporate's] facility where I work we have a union" and "union employees have a 401(k) plan" (Tr. 772, 781). The same threat, however, was made in orientation by human resources clerk Debra Nechesnoff, whom Norton trained on behalf of the Company.

Nechesnoff conducted the orientation of Tamila Fiola, who was employed September 2. Tamila Fiola appeared to have a clear recollection of what Nechesnoff said when "One of the big things" that "We went over" in the employee handbook was on the first page (that the Company "has committed to its employees to maintain a union-free environment") (Tr. 149–150; GC Exh. 2, p. 1). Tamila Fiola credibly testified (Tr. 150):

> Debbie read that, and she said that if we did get a union in here, that our 401(k) would be taken away from us, because that was something that Cargill [Corporate's parent company, whose policies and "Guiding Principles" are referred to in the handbook, R. Exh. 1 pp. 16, 18, 21] gave its employees, not its union plant employees . . . . the nonunion plants were allowed to have the 401(k) with the matching.

Similarly employee Joseph White, who also impressed me most favorably as a truthful witness, remembered that Production Supervisor Picanco said that "if we got a union in the plant that we could lose our 401(k)" plan (Tr. 273–274). I infer that Norton had also informed Picanco about the Cargill policy regarding the 401(k) plan.

I have considered the testimony of five nonunion employees called by the Company to uniformly give negative answers to a list of questions regarding allegations in the complaint (Tr. 686–767). I consider the testimony of those witnesses (whom the Company repeatedly referred to in its brief as "independent" witnesses) to be less persuasive.

I find that the Company, by Stacey Norton, engaged in coercive conduct by threatening employees with loss of their 401(k) savings plan if they selected a union to represent them, violating Section 8(a)(1).

#### 3. Threat of reprisals by Plant Manager Fleming

As found, by the time of the Company's October 14 employee meeting, support of the Union was growing. Fleming told the employees in the meeting he had "tried running the Company as a family" and "that did not work," and stated that he was going to run it "as a Company" and would "go by the book." He then stated that "if Tamila [Fiola] got fired tomorrow I wouldn't feel bad for her at work," but "outside of work I could feel horrible for her," pointing out that "business is business and personal is personal." When Tamila Fiola responded, "Well, hey Steve, is this your nice way of telling me I'm fired?" Fleming just chuckled.

I find that in the context of Fleming's statements, he was making at least an implied threat of reprisals.

I therefore find that the Company, by Fleming, threatened employees with reprisals if they selected the Union as their bargaining representation, violating Section 8(a)(1).

#### 4. Threat of reprisals by Production Supervisor Picanco

As also found, on October 18 or 20, Picanco told a group of union supporters that "If the Union comes in, I'm going to make your lives a living hell." When one of the employees said, "You can get in trouble for that," Picanco responded, "I'd deny it to my dying day."

In the Company's defense, Picanco testified "I recall being in that group," but claimed, "I don't recall making that comment" about making life hell for them. He then claimed that his comment was "I *could* [emphasis added] make their life a living hell." As indicated, I discredit Picanco's version of what he said.

I find that the Company, by Picanco, threatened employees with reprisals if they selected the Union as their bargaining representative, violating Section 8(a)(1).

I also find that even if Picanco's claim were credited, that he stated he "could" make their life a living hell, the statement would still be an unlawful threat of reprisals, in violation of Section 8(a)(1).

5. Coercive interrogation by Plant Manager Fleming

As found, on the Thursday morning, October 7 after Tamila Fiola spoke up at the employee meeting the day before and told Fleming, "I'm about this far from joining the Union," Production Supervisor Picanco stopped talking to her. Later that day, after Fleming revealed at an employee meeting his knowledge of a scheduled union meeting that evening and repeated his opposition to the Union, antiunion employees circulated a rumor that Keith and Tamila Fiola were going to be fired.

When Tamila Fiola was leaving work, Fleming met her and said, "Hey, are you going to the meeting tonight?" She answered, "No, I don't think so; it's been canceled." He said, "Well, if you do go, just ask them what can they promise you." She responded, "No, problem." Fleming then said, "Well, if you go, will you tell me what they told you?" She answered, "Sure; no problem" and left. (Tr. 159–160.)

As found, Keith and Tamila Fiola were the only employees who attended the union meeting. The next evening, when Picanco met with a group of antiunion employees at the VFW Club and was told by an outside contractor's leadman who attended the union meeting that "You've got to get rid of" Keith and Tamila Fiola, Picanco told the antiunion employees that "He was going to take care of [Keith Fiola]. It was in the making" and "they were going to take care of the troublemakers." Three weeks later the Company discriminatorily discharged "troublemakers" Keith and Tamila Fiola and Michael Paiva.

When considered in this context, I find that Fleming's interrogation of Tamila Fiola—asking if she was going to the union meeting and asking her to report back what the Union told her—tended to be coercive. He was inquiring about her union activity in an atmosphere that would cause her to be fearful that her job was in jeopardy.

I therefore find that the Company, by Fleming, engaged in coercive interrogation, violating Section 8(a)(1).

6. Coercive interrogations by Production Supervisor Picanco

As found, the next morning after the Union's second meeting on October 14, Picanco asked Michael Paiva if he had gone to the meeting. Paiva told him no, but Picanco continued to ask him, for a total of five or six times. The following Monday, October 18, the Company confiscated Paiva's union material from his locker, and the following week on October 29, the Company discharged him.

As also found, there was a large turnout at the Union's third meeting on Thursday, October 21, when a total of 21 employees signed authorization cards, a 65-percent majority of the 32 employees in the plant. The next morning, Friday, October 22, the word had gotten back to the Company. Production Supervisor Picanco asked Keith Fiola, "I heard you got 21 cards signed?"

As further found, that afternoon the Company made efforts to build a case for discharging Keith Fiola, to undercut the Union's majority. Plant Manager Fleming instructed Quality Assurance Manager Wilkinson to obtain two statements against him, telling Wilkinson that they needed "two statements to fire him." The next Monday morning, Fleming gave him a discriminatory warning, based on the two statements Wilkinson took. Two days later, Wednesday, October 27, the Company discharged him.

I find that in the context of the actions taken against Michael Paiva and Keith Fiola, Picanco's repeated interrogations of Paiva regarding his attended the October 14 union meeting and Picanco's interrogation of Keith Fiola after the October 21 meeting, asking "I heard you got 21 card signers signed? constituted coercive interrogations about their union activities and violated Section 8(a)(1).

I reject the request in the General Counsel's brief (at 57–58) that I reconsider my February 16, 2000 order denying as untimely (after the close of the trial on January 16, 2000) the General Counsel's February 10, 2000 motion to amend the complaint to allege, in part, that the Company, by Picanco, on October 8 threatened employees by stating that employees who supported the Union would be fired and on several occasions in late October threatened employees by telling employee Jan Pacheco that employees who supported the Union would be discharged.

*E. Alleged Unlawful Wage Increase to Discourage Union Support*

In September the Company first began hiring employees for a second shift. While awaiting approval from USDA, the Company assigned the second-shift employees to work alongside employees on the first shift. (Tr. 802; R. Exh. 8, pp. 5–7.)

Sometime in October the Company, expecting prompt approval for the second shift, ran a newspaper ad in the local newspapers for second-shift employees. There was a night differential of 50 cents an hour. When the newest employees came in, the Company informed them that there was no second shift and that they would be working on the first shift and be trained by the older employees. The USDA finally gave its approval for the full second shift to begin January 3, 2000. (Tr. 245, 563, 629–635, 803; R. Exh. 8 pp. 10–11.)

When the first-shift employees discovered that they were being paid 50 cents less for working with and training second-shift employees, they began complaining. In response, the Company obtained approval from Corporate to give them a 50-cent raise. The arrangement was that this raise would take the place of two scheduled 25-cent raises, a 3-month and a 6-month raise. By the end of 6 months of employment, the first-shift employees would be back on the wage scale in the employee handbook. (Tr. 54–56, 172–174, 245–246, 249–254, 543–551, 829–833; GC Exh. 2, p. 6.)

The General Counsel contends in his brief (at 62) that granting the immediate wage increase to the first-shift employees violated the wage progression system and "directly impacts the exercise of employees' Section 7 rights by sending the message that [the Company] will respond to concerns if employees back off from organizing efforts." I disagree.

The Company had three choices for eliminating the disparity in the wages of the first-shift employees and the planned second-shift employees while both were working on the day shift.

(1) It could seek approval of Corporate to give the first-shift employees a 50-cent raise above the wage scale prescribed by Corporate in the employee handbook, eliminating the 50-cent differential in the wages of day-shift and night-shift employees. To restore the 50-cent night differential after 6 months of employment, the Company would then have to give the second-shift employees a second 50-cent raise. (2) It could seek approval of Corporate (as it did) to accelerate the first-shift employees' two scheduled wage increases, of 25 cents after 3 months and 6 months of employment. (3) It could eliminate, until the second shift began, the 50-cent night differential which the Company promised upon hiring the second-shift employees and which the Company was currently paying.

Although the Company probably believed that making the second choice would discourage some of the employees from supporting the Union, I find that it would have made that choice even in the absence of any union organizing.

The first choice meant a permanent increase in the nonunion wages prescribed by Corporate in the employee handbook. And, because of the low employee morale that had been caused in part by high employee turnover resulting in long working hours, the Company could not afford to aggravate the low employee morale by cutting wages of the planned second-shift employees.

I therefore agree with the Company's contention in its brief (at 38) that "The acceleration of an already scheduled wage increase for first shift employees was a legitimate and lawful response to employee concerns regarding wage disparities among first and second shift employees working side-by-side on the first shift."

I reject the allegation that the Company unlawfully granted the wage increase.

CONCLUSIONS OF LAW

1. By discriminatorily discharging Keith Fiola and Tamila Fiola on October 27 and Michael Paiva on October 29, 1999, because of their union activity, to undercut the Union's majority, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By discriminatorily discharging Jan Pacheco on October 28 and Ernest Watson on November 23, 1999, to conceal its unlawful motivation for discharging Michael Paiva, the Company violated Section violated Section 8(a)(3) and (1).

3. By issuing a discriminatory warning on October 25 to Keith Fiola to build a case for discharging him, the Company violated Section 8(a)(3) and (1).

4. By engaging in surveillance of union activities, the Company violated Section 8(a)(1).

5. By threatening employees with the loss of their 401(k) payroll deduction saving plan if they selected a union to represent them, the Company violated Section 8(a)(1).

6. By making threats of reprisals if the employees selected the Union as their bargaining representative, the Company violated Section 8(a)(1).

7. By engaging in coercive interrogation of employees about union activities, the Company violated Section 8(a)(1).

8. The Company's granting the wage increase to the first-shift employee was lawful.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees Keith Fiola, Tamila Fiola, Jan Pacheco, Michael Paiva, and Ernest Watson, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Before the Respondent discriminatorily discharged Jan Pacheco's to conceal its unlawful motivation for discharging Michael Paiva, as found, it had offered her the lead position on the upcoming second shift. I therefore find that she must be offered reinstatement as the second-shift lead person at the higher lead person rate. Her backpay must be increased to that higher rate from January 3, 2000, when the full second shift began.

If Pacheco does not accept reinstatement at the lead person wage rate, I find that the Respondent must offer Keith Fiola the lead position if he is willing to go to the second shift, as the Respondent offered before he engaged in the union organizing activity. If Keith Fiola accepts the night-shift lead position, his backpay must be increased to the lead person rate from January 3, 2000.

As found, the Respondent discriminatorily discharged union organizers Keith Fiola, Tamila Fiola, and Michael Paiva on October 27 and 29, 1999, after it learned the week before that the Union had obtained signed authorization cards from 21 of its 32 employees, a 65-percent majority. As further found, the Respondent discharged these union organizers to undercut the Union's majority. Particularly because the discharges frustrated the hopes of the majority to obtain union representation, I find that special notice and access remedies, found necessary in *Audubon Regional Medical Center*, 331 NLRB at 375, 376, are necessary to dissipate fully the coercive effects of the discharges and other unfair labor practices.

If the Respondent does not have bulletin boards or other places where notices to employees are customarily posted, it must duplicate and mail, at its own expense, a copy of the notice to all current bargaining unit employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended2

ORDER

The Respondent, Excel Case Ready, Taunton, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, warning, or otherwise discriminating against any employee for supporting United Food and Commercial Workers Union, Local 791, AFL–CIO or any other union.

(b) Discharging any employee to conceal its unlawful motivation for discharging a union supporter, or to undercut the Union's majority support among the employees.

(c) Engaging in surveillance of union activities.

(d) Threatening employees with the loss of their 401(k) payroll deduction saving plan or with other reprisals if they select a union to represent them.

(e) Coercively interrogating any employee about union support or union activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Keith Fiola, Tamila Fiola, Jan Pacheco, Michael Paiva, and Ernest Watson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, in the manner set forth in the remedy section of the decision.

(b) Make Keith Fiola, Tamila Fiola, Jan Pacheco, Michael Paiva, and Ernest Watson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and the written warning to Keith Fiola, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and warning will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Supply the Union, on its request made within 1 year of the date of this Decision and Order, the full names and addresses of its current bargaining unit employees.

(f) On request, grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where notices to employees are customarily posted.

(g) Within 14 days after service by the Region, post at its facility in Taunton, Massachusetts, copies of the attached notice marked "Appendix."3 Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 1999.

(h) Within 60 consecutive days of the date of this Decision and Order, convene the bargaining unit employees during working time at the Respondent's facility, by shifts, and have a responsible management official of the Respondent read the notice to employees or permit a Board agent, in the presence of a responsible management official of the Respondent, to read the notice to employees.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."